Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

COLISEUM SQUARE ASSOCIATION, *et al.*,
Petitioners,

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Environmental Policy Act requires a federal agency to prepare an Environmental Impact Statement (EIS) before undertaking a major action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The U.S. Department of Housing and Urban Development did not prepare an EIS before approving the transfer of federal land and expenditure of millions of dollars so that a private developer could build a big-box retail store and other large, multi-story buildings in the southern portion of the Lower Garden District. The Lower Garden District is part of historic New Orleans and is listed on the National Register of Historic Places because it retains its mid-Nineteenth Century appearance.

The question presented is:

Whether, as the First, Second, Ninth, Eleventh, and D.C. Circuits have held, an agency must prepare an Environmental Impact Statement whenever a major federal action is likely to significantly affect the quality of the human environment or whether, as the Third, Fifth, and Tenth Circuits have held, an agency need not prepare an Environmental Impact Statement unless a major federal action will certainly significantly affect the quality of the human environment.

PARTIES TO THE PROCEEDING

Coliseum Square Association, Inc.; Smart Growth for Louisiana; Louisiana Landmarks Society, Inc.; Historic Magazine Row Association; and The Urban Conservancy, Inc. are petitioners in this Court, were appellants in the court of appeals, and were plaintiffs in the district court.

Alphonso Jackson, Secretary of Housing and Urban Development, is a respondent in this Court, was an appellee in the court of appeals, and was a defendant in the district court.

The Housing Authority of New Orleans is a respondent in this Court, was an appellee in the court of appeals, and was an intervening defendant in the district court.

RULE 29.6 DISCLOSURE

Coliseum Square Association, Inc. has no parent or publicly held company owning 10% or more of its stock.

Smart Growth for Louisiana has no parent or publicly held company owning 10% or more of its stock.

Louisiana Landmarks Society, Inc. has no parent or publicly held company owning 10% or more of its stock.

Historic Magazine Row Association has no parent or publicly held company owning 10% or more of its stock.

The Urban Conservancy, Inc. has no parent or publicly held company owning 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 465 F.3d 215 and is reprinted in the Appendix to the Petition (App.) at 1a. The relevant opinions of the United States District Court for the Eastern District of Louisiana are reprinted at App. 52a and App. 68a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on September 18, 2006. The court of appeals denied petitioners' timely rehearing petition on December 13, 2006. (App. 79a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory provisions and regulations are set forth in the Appendix at 82a-88a.

STATEMENT OF THE CASE

A. Statutory Background

Signed into law on January 1, 1970, the National Environmental Policy Act (NEPA) establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321. "NEPA itself does not mandate particular results" in order to accomplish these ends. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Rather, NEPA imposes procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions. *See id.* at 349-50.

At the heart of NEPA is a requirement that federal agencies prepare a "detailed statement" – known as an Environment Impact Statement (EIS) – for "major Federal actions sig-

nificantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS must consider five things:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. In short, NEPA provides criteria to guide an agency's consideration of the environmental tradeoffs involved in major federal actions.

The Council of Environmental Quality (CEQ) was established by NEPA with authority to issue regulations interpreting that statute. CEQ has promulgated regulations to guide federal agencies in determining what actions are subject to the statutory requirement to prepare an EIS. *See* 40 C.F.R. § 1500.3. The CEQ regulations allow an agency to prepare a more limited document, an Environmental Assessment (EA), when the action will not significantly affect the human environment. *See id.* §§ 1501.4(a)-(b). An EA is to be a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." *Id.* § 1508.9(a). CEQ regulations require an agency preparing an EA to consider "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources." *Id.* § 1508.27(b)(3). If, after preparing an EA, an agency determines that an EIS is not required under applicable CEQ regulations, it must issue a "finding of no significant impact" (FONSI), which briefly presents the reasons why the proposed agency action will not have a significant impact on the human

environment. *See id.* §§ 1501.4(e), 1508.13. *See generally Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-58 (2004).

B. Factual Background

This case involves a well-intentioned, necessary urban public renewal plan, for an historic area of New Orleans, that was hijacked to serve the interests of a developer and a big-box retailer looking for land in an urban area. *See* Stacy Mitchell, *Big Box Swindle* 15 (2006) ("In the heart of historic New Orleans, the demolition of a public-housing complex provided sufficient acreage for Wal-Mart to build a two-hundred-thousand-square-foot Supercenter surrounded by an ocean of parking.").

The historic area of concern here is the Lower Garden District. (*See* App. I) The district is adjacent to downtown New Orleans, the National Historic Landmark Garden District, and the Mississippi River. In the early Nineteenth Century, two plantation owners asked Bartheleme Lafon to draw up plans for subdividing their property. Lafon planed a community with basins, fountains, tree-lined canals, market places, and parks. By the time of the Civil War, the Lower Garden District included many grand houses encircling a central park that Lafon had named Coliseum Place. During the Depression, a housing project – the St. Thomas Housing Development (St. Thomas) – was built in the southern portion of the Lower Garden District. In keeping with the pedestrian scale of the historic neighborhood, St. Thomas originally included 970 units in two- and three-story solid masonry brick buildings arranged around outdoor spaces. In 1952, 540 more housing units were added. The ensuing decades exacted a toll on St. Thomas and, by the early 1990s, the public housing development was decaying, outdated, and dangerous.[1]

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[1] *See generally* History of the Lower Garden District, http://www.coliseumsquare.org/lower_garden_district_pages/history.html.

In 1996, respondent Department of Housing and Urban Development (HUD) granted respondent Housing Authority of New Orleans (HANO) $25 million through the HOPE VI program for the revitalization of St. Thomas. The original plan proposed fifty percent public housing, thirty percent low-income housing, and twenty percent market-rate housing. There was no planned retail. This proposal had broad-based support, including the support of petitioners here.

In 2000, the character of the proposed revitalization changed dramatically. At the urging of a private developer (Historic Restorations Inc. (HRI)), HANO proposed including as part of the urban project a 275,000 square-foot retail center with an 850-space parking lot, a fourteen-story market-rate housing condominium, a thirteen-story continuing care facility, and other small scale commercial ventures.[2] HUD waived income eligibility regulations for the project, so that it would now include very little low-income housing. After the size of the Wal-Mart Supercenter was reduced to 200,000 square feet, HUD approved the revised plan. HUD did not prepare an EIS. (App. 8a.)

Because the Lower Garden District reflects and retains its mid-Nineteenth Century appearance, the area is listed on the National Register of Historic Places.[3] The center of commer-

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[2] Specifically, "the proposed undertaking" included "[n]ew construction of Riverview Continuing Care Retirement Center, consisting of approximately 312 units in one 13-story structure covering one city block with structured parking"; "[n]ew construction of residential condominiums that consist of one 14-story structure of approximately 100 units with structured parking"; and "new construction of Riverview Retail Development of approximately 199,000 square feet, with surface parking for 825 automobiles" "to be occupied by a Super Wal-Mart." (App. 96a.)

[3] As described by the National Park Service, the Lower Garden District is

> characterized by contrasting land uses and a variety of building types and styles including Greek Revival and those of the Victorian era[;] notable are Coliseum Square with its park, surrounding grand dwell-

cial activity in the Lower Garden District offers "an array of coffeehouses, antique stores, restaurants, and light commercial businesses." (Environmental Assessment and Compliance Findings for the Related Laws (hereinafter "HUD EA") at 0003 (on file in the Clerk's Office).)

C. Agency And District Court Proceedings

Petitioners are not-for-profit organizations representing businesses and people that share an interest in the cultural, historic, and socioeconomic vitality of New Orleans.

In July 2002, petitioners filed suit in the Eastern District of Louisiana. Among other things, petitioners sought an injunction compelling HUD to withhold HOPE VI funds until HUD prepared an EIS for the St. Thomas Project. HUD then agreed to reconsider whether to prepare an EIS and restricted work on the project to residential infrastructure work and environmental remediation. In February 2003, HUD again decided that it did not need to prepare an EIS. (*See* HUD EA.) Among other conclusions, HUD found that (1) the project was "compatible with the surrounding development," (2) there were no cumulative effects (other than traffic) that needed to be considered, and (3) no National Historic Landmarks were affected by the project. (HUD EA at 001-005.) The district court denied petitioners' request for a temporary restraining order. In considering HUD's failure to prepare an EIS, the district court applied a "highly deferential standard of review," one with the "least latitude in finding grounds for reversal." (App. 74a.) In a single conclusory paragraph, the district court applied this

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ings and the 19th C. scheme of canals and fountains and the Magazine St. commercial structures, many with 1- and 2- story verandas.

See Lower Garden District – Information, http://www.nr.nps.gov/nrname1.htm (follow "State and Resource Name" hyperlink; then enter "LA" into the "state code" box and "Lower Garden District" into "name" box and follow "Execute" hyperlink; then follow "WEB PAGE" hyperlink).

highly deferential standard and approved HUD's decision not to prepare an EIS. (App. 74a-75a.)

D. The Fifth Circuit's Decision

Petitioners appealed to the Fifth Circuit.[4] The court noted that "[i]t is undisputed that HUD's funding of the project is a major federal action" so that NEPA applies. (App. 12a.) Thus, the question before the court of appeals was "whether HUD acted reasonably and in accordance with law in deciding, based on its EA and FONSI, that its action had no direct or indirect effects that significantly affected the quality of the human environment," and thus no EIS was necessary. (*Id.*) Importantly, the court did not seriously dispute that the project was *likely* to significantly affect the quality of the human environment. Nevertheless, the court of appeals permitted HUD to continue to spend federal funds on the project without preparing an EIS.

The court of appeals upheld HUD's decision not to prepare an EIS – despite the project's likely significant impacts on the environment – by applying a standard of judicial review that permits agencies to avoid the EIS process unless the significant impacts will *definitely* come to pass. The court posed the legal question as whether "HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project *would* significantly affect the

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[4] At the outset, the court of appeals rejected respondents' argument that completion of the Wal-Mart portion of the projected rendered this case moot. The court observed that "[t]he following construction was planned but not yet begun: 200 mixed-income rental units, 64 affordable rental housing units for the elderly, a 250-unit market-rate rental retirement community, and 200 market-rate condominium units; additional small-scale commercial ventures, which may be included in some of the new residential construction; and construction or rehabilitation of affordable rental housing (90 units) and affordable individually owned houses (50 units)." (App. 10a.)

quality of the human environment." (App. 17a (emphasis added).) By asking whether the project "would" affect the quality of the human environment, the Fifth Circuit applied a standard of judicial review that is exceptionally deferential to the agency.

By using that standard, the court of appeals was able to sanction HUD's decision not to prepare an EIS despite the likely impact of the Wal-Mart project on the character of the historic Lower Garden District. Many opponents of the project predicted that the project would seriously erode the historic, pedestrian-focused character of the neighborhood.[5] Approving a Wal-Mart Supercenter in historic New Orleans required massive changes in zoning laws. (*See, e.g.*, App. 90a (April 11, 2002 draft study of Lambert Advisory LC) (noting "Wal-Mart's insistence with maintaining a parking lot sized beyond what the City zoning code allows").) The zoning changes were necessary, of course, not because the project called for land use consistent with the status quo, but because it called for a material change: the demolition of the existing affordable residential housing (and the displacement of the community that it supported), in favor of a 200,000 square-foot Wal-Mart Supercenter with associated massive parking requirements; a market-rate retirement community; and high-rise, market-rate apartments.

The private developer – pointing to certain design features, such as the partial use of "bricks" (concrete masonry blocks) – suggested that the big-box store and other high-rise buildings would fit right into the Lower Garden District's mid-Nineteen Century style. In justifying the decision not to prepare an EIS, HUD stated only that the project was "compatible with the surrounding development" and "complied with local zoning ordi-

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[5] As one architect asked, "[w]here is the argument that there are other parking lots of that size [850 spaces] in this neighborhood or anywhere in uptown New Orleans[?]" (App. 90a.)

nances," without explaining how it was compatible or noting that zoning changes were necessary to accommodate the project. (HUD EA 001, 002, 003, 005.) In upholding HUD's conclusion that the future consequences of the Wal-Mart Supercenter would not significantly affect the quality of the Lower Garden District neighborhood, the court of appeals emphasized that the proposed store would be "located on the Tchoupitoulas industrial corridor." (App. 21a.) Even HUD admitted, however, that the Project's area of potential effects was not limited to the Tchoupitoulas corridor, but extended across the rest of the Lower Garden District, and most of urban New Orleans. (*See* App. I.) The court, however, concluded that petitioners had not established that the consequences of the Wal-Mart Supercenter would *necessarily* have a significant effect on the quality of the neighborhood, and it thus approved HUD's determination. (*See* App. 20a-21a.)

Similarly, the court of appeals approved HUD's decision not to prepare an EIS even though it was likely that a significant impact on the environment would be caused by other retailers following Wal-Mart into the Lower Garden District. HUD's administrative record contained an economic study showing that the Project, as conceived, would likely lead to a rush of other national chain stores. *See* Appellants' Fifth Circuit Record Excerpt 8, at 1; *id.* at 39 ("it is understandable that local businesses and residents view Wal-Mart as the first wave of the national retailers"). Despite this evidence, HUD never considered the possible effects that a larger migration of businesses might have on the Lower Garden District. In approving HUD's decision, the court declared that this "statistical data discussing general national trends" was "speculative" because there was "nothing concrete" to show that an influx of national chain retailers *will* occur. (*See* App. 29a.)

So too, the court was able to excuse HUD's failure to perform an EIS despite the project's potential impact on historic properties only by suggesting that the impact on the properties was not certain. As the map reproduced in the appendix con-

veys, the project threatened to affect many historic sites, including sixty-eight properties listed on the National Register of Historic Places, twelve National Register Districts, two National Historic Landmark (NHL) properties, and two NHL Districts (the Garden District and the Vieux Carre, more commonly known as the French Quarter). (*See* App. I.) The record is unequivocal that HUD relied exclusively on the opinions of the National Park Service (NPS) in concluding that the Project would not significantly affect any Landmarks. (*See* App. 34a, 38a-40a; HUD EA at 0005.) NPS, however, had not actually come to that conclusion. It informed HUD that "our files contain *insufficient information* to allow us to clarify the [no-impact] position stated previously by this office," and that "we cannot clarify the reasoning for the previous NPS decision." (App. 92a (emphasis added).) Recognizing the potentially significant impact on NHLs, NPS noted that "the National Historic Landmarks are considered to be the most important historic landmarks in the United States. They are national treasures worthy of extra caution." (*Id.*)[6] In affirming HUD's finding, the court of appeals stated that petitioners had not proven that "HUD was . . . arbitrary and capricious in relying on the National Park Service's [inscrutable] determination as support for its conclusion that the project would have no significant impact." (*See* App. 40a.)

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[6] The NPS employee who had surveyed the area and prepared the NPS opinion letters left the NPS between the time he sent the letters and the time HUD reopened the matter, and was thus unable to provide the basis for his opinions. (App. 93a.) Accordingly, the NPS asked HUD to delay the approval process "to provide [the NPS] time to respond adequately on the project's impacts on the National Historic Landmarks." *Id.* Less than a month later, however, the NPS sent HUD a letter withdrawing the request for more time. Rather than providing with any basis or rationale for its earlier no-impact finding, it provided only reasons for allowing HUD to proceed: that "HUD . . . appropriately sought NPS' comments and relied on those comments in good faith." (*Id.* at 94a.)

REASONS FOR GRANTING THE PETITION

There is a longstanding and pervasive circuit disagreement on the standard of review applicable to a federal agency's decision not to prepare an Environmental Impact Statement. An agency considering a project in Colorado or Texas is free to ignore possible but uncertain effects when deciding whether to prepare an EIS.[7] The same agency considering an identical project in Connecticut, Nevada, or Maine must consider all of the likely significant effects of the project in determining whether to prepare an EIS.[8] Thus, once again, "[t]he lower courts [are] in disarray on what standard of review to apply to an agency's decision not to undertake an EIS." *Gee v. Boyd*, 471 U.S. 1058, 1059-60 (1985) (White, J., joined by Brennan and Marshall, J.J., dissenting from denial of petition for writ of certiorari) (citations omitted).

The question of the proper standard for judicial review of an agency decision not to prepare an EIS is exceptionally important. NEPA applies to every federal agency, and the decision to issue an EIS – or not – is at the statute's core. Thus, the standard by which a court reviews that decision vastly impacts the process of federal environmental decisionmaking. Because consideration of environmental risk goes to the heart of the structured environmental assessment mandated by NEPA, those circuits that allow an agency to sidestep the EIS process merely because a future impact is uncertain seriously impede the goals of the statute. Moreover, those circuits that

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[7] *City of Waltham v. U.S. Postal Serv.*, 11 F.3d 235, 240 (1st Cir. 1993); *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997); *Ocean Advocates v. Army Corps of Engineers*, 402 F.3d 846, 865-67 (9th Cir. 2004); *Hill v. Boy*, 144 F.3d 1446 (11th Cir. 1998); *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983).

[8] *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168 (3d Cir. 2000); *Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 677 (5th Cir. 1992); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257 (10th Cir. 2004).

are sidestepping NEPA are doing so by claiming support from this Court's decision in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). The Court has a special obligation to clarify the law where circuit courts are misinterpreting prior decisions of the Court.

Not only is the circuit split longstanding and the issue exceptionally important, but this is an ideal case for the Court to bring clarity to the issue. In this case, HUD explained its failure to prepare an EIS by stating that the project was compatible with the existing neighborhood, that no other retailers were likely to follow the big-box retailer, and that the National Park Service had found no harm to nearby historic landmarks. In truth, the 200,000 square foot concrete-masonry block building – a building requiring massive changes in local zoning laws – bears little resemblance to the rest of the mixed-use historic district; economic evidence strongly suggested other retailers would follow the Project; and the National Park Service told HUD it could not discern any basis for its no-harm-to-landmarks finding. The only rationale a court of appeals could possibly use to approve HUD's decision not to prepare an EIS is that the court could not be certain that the project "would" significantly affect the quality of the human environment. Thus, the issue of whether an agency must prepare an EIS where a major federal project may have significant effects on the quality of the human environment is squarely presented for the Court.

I. THE DECISION OF THE COURT BELOW EXACERBATED A LONGSTANDING CONFLICT IN THE COURTS OF APPEALS REGARDING WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS

Courts have long struggled with identifying the appropriate standard of judicial review for agency decisions not to prepare an EIS. More than two decades ago, Justice White urged this Court to grant review and bring order to the then-existing state

of chaos among the circuits regarding the appropriate standard of review of an agency's decision not to prepare an EIS under NEPA. *Gee*, 471 U.S. at 1059-60.[9] Shortly thereafter, this Court's unanimous opinion in *Marsh* attempted to clarify the standard for reviewing an agency's decision not to prepare an EIS.

In *Marsh*, this Court held that such a decision is reviewed under the "arbitrary and capricious" standard articulated in the Administrative Procedures Act, 5 U.S.C. § 706(2)(A). *See* 490 U.S. at 377. In so doing, the Court reaffirmed its longstanding doctrine that the reviewing court "must consider whether" the agency's decision not to prepare an EIS "was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[10] *Id.* Although "the ultimate standard of review is a narrow one," the inquiry must be "searching and careful." *Id.* at 378 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

Eighteen years after *Marsh*, the courts of appeals are again in disarray on the proper standard of review to apply to an agency decision not to prepare an EIS. Consistent with the clear intent of *Marsh*, some circuits apply a "searching and careful" form of arbitrary and capricious review. Other circuits, however, have erroneously relied on *Marsh* to sanction

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[9] Justice White explained: "The First, Second, and Seventh Circuits, like the Fourth, will reverse such agency action only if it is arbitrary or capricious. Four other Circuits have employed a "reasonableness" standard of review. The Third Circuit has assumed, without deciding, that a "reasonableness" standard is appropriate, and the Sixth Circuit has similarly declined to choose between the two standards. The Court of Appeals for the District of Columbia Circuit has developed a four-part test to determine whether the agency action is arbitrary and capricious. . . ." *Gee*, 471 U.S. at 1059.

[10] Although *Marsh* concerned the decision of an agency not to prepare a supplemental EIS, *Marsh* also applies to an agency's decision not to prepare an EIS in the first instance. *See* Daniel R. Mandelker, *NEPA Law and Policy* § 8:7 (2d. ed. 2006).

agency review that is so deferential as to be practically non-existent. In particular, several circuits, including the Fifth Circuit below, have distorted *Marsh* to stand for the proposition that a court will not disturb an agency's refusal to prepare an EIS unless the significant impacts would necessarily occur. *See generally* Korey A. Nelson, Comment, *Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See the Forest Because There are Too Many Trees*, 17 Tul. Envtl. L.J. 177 (2003) (discussing the conflict among the courts of appeals regarding appropriate standard of review under *Marsh*).

A. The First, Second, Ninth, Eleventh, And D.C. Circuits Apply A Less Deferential "Substantial Possibility" Standard

The First, Second, Ninth, Eleventh, and D.C. Circuits review an agency's decision not to prepare an EIS under a "substantial possibility" standard that assures the agency has conducted a thorough examination into a project's *potential* effects before determining that no EIS is needed.

The First Circuit reviews an agency determination not to prepare an EIS for whether it shows "a 'substantial *possibility*' that the project '*could* significantly affect the quality of the human environment.'" *City of Waltham v. U.S. Postal Serv.*, 11 F.3d 235, 240 (1st Cir. 1993) (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 870-71 (1st Cir. 1985) (Breyer, J.)) (emphasis added). The First Circuit will reverse an agency's decision not to prepare an EIS unless the agency has adequately considered all substantially probable effects of its project. *See, e.g.*, *Sierra Club*, 769 F.2d at 877 (refusing to uphold agency's decision not to issue EIS where agency failed "to consider adequately the fact that building a port and causeway *may* lead to the further industrial development").

Like the First Circuit, the Second Circuit asks whether an agency considered the "possibility" of significant impacts. For example, in *National Audubon Society v. Hoffman*, 132 F.3d 7,

18 (2d Cir. 1997), the Second Circuit reversed a decision by the National Forest Service not to prepare an EIS. *Id.* Because the Forest Service had failed to consider the *possible* effects of the challenged action, the court concluded that its "determination that preparation of an EIS was not necessary, based on the record before it, was . . . arbitrary and capricious." *Id.* Thus, under the Second Circuit's approach, "NEPA's policy goals require agencies to err in favor of preparation of an EIS when the proposed action is *likely* to have a significant environmental impact," and "a party challenging the agency's decision not to prepare an EIS must [thus] show only that there is a *substantial possibility* that the action may have a significant impact on the environment." 132 F.3d at 18 (emphasis added). The Second Circuit expressly rejects the view (adopted by the Fifth Circuit here) that the challenger must demonstrate that the significant impact will occur. *Id.* ("*not* that it clearly will have such an impact" (emphasis added)).

Similarly, the Ninth Circuit requires federal agencies to inquire into "potential" effects before declining to prepare an EIS. For example, in *Ocean Advocates v. Army Corps of Engineers*, the Army Corps had relied upon "a letter from BP [the refinery operator] stating that only market forces, and not the additional pier [the construction of which required Corps approval], would increase total vessel traffic." 402 F.3d 846, 865-67 (9th Cir. 2004). But because the Corps "failed to demonstrate . . . that it critically evaluated the *potential* increase in tanker traffic from the dock extension alone," the court reversed the Corps' decision, notwithstanding the lack of any concrete evidence proffered by the challengers that the dock addition would in fact increase tanker traffic. *Id.* at 867 (emphasis added). In so doing, the court explained that an "EIS *must* be prepared if substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor." *Id.* at 864-65 (internal quotation marks and alterations omitted); *accord Idaho Sporting*

Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992). Like the Second Circuit, the Ninth Circuit has expressly rejected the contrary view: "To trigger this [EIS] requirement a plaintiff need not show that significant effects *will in fact occur*," "raising substantial questions whether a project *may* have a significant effect is sufficient." *Ocean Advocates*, 402 F.3d at 866 (internal quotation marks and alteration omitted).

So too, the Eleventh Circuit has refused to permit an agency to avoid preparing an EIS merely because there is only the "potential" of a significant effect on the quality of the human environment. In *Hill v. Boy*, the Army Corps of Engineers chose not to create an EIS in connection with the issuance of dredge-and-fill permits needed for the construction of a dam and reservoir, the site of which was crossed by an existing underground petroleum pipeline. 144 F.3d 1446 (11th Cir. 1998). The court of appeals reversed due to the corps' failure to "take a 'hard look' at the *potential* adverse environmental consequences of such a pipeline," as the Corps had ignored the possibility that the existing pipeline might leak oil into the reservoir, and instead assumed that the pipeline would be relocated before the dam was built, without procuring any agreement to that effect. *Id.* at 1451.

The D.C. Circuit also requires agencies to consider possible (but not certain) effects. The court requires an agency to prepare an EIS "[i]f *any* significant environmental impacts *might* result from the proposed agency action." *See Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (*Peterson*) (McKinnen, J., joined by Wright and Scalia, J.J.) (second emphasis added); *see also Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002). In *Peterson*, the United States Forest Service decided not to issue an EIS with respect to an oil and gas leasing program. The D.C. Circuit reversed: "NEPA requires that federal agencies determine at the outset whether their major actions *can* result in 'significant' environmental impacts." *Id.* at 1413-14 (emphasis added). The

court thus held that the Forest Service failed to comply with NEPA by foregoing the EIS process despite the potential effects of drilling on the non-highly sensitive lands. *See id.* at 1414-15.

In sum, the First, Second, Ninth, D.C., and Eleventh Circuits all require federal agencies to prepare an EIS where a major federal action may significantly affect the quality of the human environment, even if it cannot be shown that it certainly will.

B. The Third, Fifth, And Tenth Circuits Apply A Highly Deferential Standard, Obliging the Challenger To Show That The Major Federal Action "Would Cause" A Significant Impact

As illustrated by the decision below, some circuits are misinterpreting *Marsh* to require a highly deferential standard of review of an agency's decision to dispense with the EIS process. Under these courts' approach, an agency's decision not to prepare an EIS will be affirmed unless the challenger can show that the project will, in fact, cause significant effects on the human environment.

Thus, in this case, the Fifth Circuit excused HUD's failure to prepare an EIS by noting the slim chance that the events feared by petitioners might not in fact come to pass: placing a Wal-Mart Supercenter and other high-rise buildings in the Lower Garden District might not significantly alter the historic quality of the neighborhood; other national retailers might not follow Wal-Mart into the Lower Garden District; and the project might not significantly impact nearby National Historic Landmarks. (*See* App. 21a-22a, 29a, 40a.) Under the Fifth Circuit's view, a federal agency is free to ignore serious potential effects on the quality of the human environment because there is some modest chance that these feared events might not occur.

Like the Fifth Circuit, the Third Circuit permits an agency to avoid an EIS despite the existence of potentially significant

effects on the quality of the human environment. In *Society Hill Towers Owners' Ass'n v. Rendell*, HUD financed the construction of a hotel and parking complex in downtown Philadelphia without preparing an EIS. *See* 210 F.3d 168 (3d Cir. 2000). In reaching its decision that no EIS was needed, HUD never considered the cumulative effects that would result from building the hotel and parking complex in connection with other projects that had been proposed for the area, including the creation of a "mega" entertainment complex. *See id.* at 182. The court upheld HUD's decision to ignore those potential effects because it was "not at all *certain* that the proposed 'mega' entertainment complex or any of the projects included in the planning documents [would] ever be completed." *Id.* (emphasis added). Because the challengers could not establish that the proposed projects would in fact be built, the Third Circuit held that NEPA did not oblige HUD to consider the possibility of such construction before foregoing the EIS process altogether.

Like the Third and Fifth Circuits, the Tenth Circuit also permits agencies to avoid the EIS process even though a major federal action is likely to significantly affect the human environment. For example, in *Greater Yellowstone Coalition v. Flowers*, the court upheld the Army Corps of Engineers' decision not to prepare an EIS concerning construction of a 359-acre golf course and upscale housing development in the Snake River Canyon. *See* 359 F.3d 1257 (10th Cir. 2004). The site of the proposed construction (which was a wetland subject to the Corps' jurisdiction) contained an "intact and healthy riparian ecosystem" supporting bald eagle nesting territories in addition to moose, elk, mule deer, black bears, mountain lions, trumpeter swans, and Snake River cutthroat trout. *See id.* at 1263. Although the Corps recognized that the impact on the bald eagle nesting grounds left a "continuing potential for disturbance due to increased human activity in the area," it nonetheless dispensed entirely with the EIS process. *Id.* at 1276. In upholding the Corps' decision, the Tenth Cir-

cuit explained that the evidence before the Corps "could not predict with *certainty* how the resident bald eagles would react to the Canyon Club development." *Id* (emphasis added). The court thus affirmed the Corps' decision not to prepare an EIS because "the past behavior of eagle pairs cannot be used to predict the future behavior of these and other eagle pairs within the Snake Unit." *Id.* In other words, the very fact that it was impossible to determine whether the project would certainly cause a significant effect on the nesting eagles was sufficient to support the Corps' decision not to prepare an EIS.

In sum, the Third, Fifth, and Tenth Circuits only require federal agencies to prepare an EIS where a major federal action will definitely significantly affect the quality of the human environment.

II. WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS IS A QUESTION OF EXCEPTIONAL IMPORTANCE THAT THIS COURT MUST RESOLVE

The deep circuit split is vitally important because resolution of the dispute will have significant consequences for the practice of environmental decisionmaking. And because much of the circuit disagreement turns on this Court's decision in *Marsh*, the Court has a special responsibility to clarify this area of the law.

The standard of review adopted by the Third, Fifth, and Tenth Circuits hands federal agencies *carte blanche* to ignore NEPA's core requirement. The requirement that an agency prepare a fully informed and reasoned EIS before undertaking any "major" action "significantly affecting the human environment" lies at the "heart" of NEPA. *See Pub. Citizen*, 541 U.S. at 757-58 (citing 42 U.S.C. § 4332(2)(C)). Thus, this Court has mandated that courts reviewing agency decisions to forego the EIS process "carefully review[] the record and satisfy[] themselves that the agency has made a reasoned decision

based on its evaluation of the significance – or lack of significance – of the [relevant] information." *Marsh*, 490 U.S. at 378. The environmental consequences of practically every federal action are uncertain because the future is not yet known. The standard applied by the Third, Fifth, and Tenth Circuits permits agencies to ignore the EIS requirement in essentially every case simply by pointing to some mere possibility of uncertain future consequences. Indeed, this highly deferential standard permits agencies to sidestep NEPA *precisely* where careful decisionmaking is needed – when the potential outcome is uncertain.

In contrast, the position of the First, Second, Ninth, D.C., and Eleventh Circuits comports with NEPA and *Marsh*. Under the approach adopted by those courts, doubt is resolved in favor of preparing an EIS. By assuring that agencies prepare an EIS whenever a major federal action is likely to significantly affect the human environment, these circuits assure that agencies undertake to evaluate the environmental tradeoffs when their actions put the quality of the environment at risk.

Notably, those courts of appeals who have adopted a standard at odds with NEPA's core requirement have often attributed their highly permissive standard to *Marsh*. For example, prior to *Marsh*, the Fifth Circuit reviewed an agency's decision not to prepare an EIS for reasonableness, a standard it described as "less deferential" and "more rigorous" than the "arbitrary and capricious" standard. *See Fritiofson v. Alexander*, 772 F.2d 1225, 1237-38 (5th Cir. 1985). Subsequently, however, the Fifth Circuit determined that this Court's *Marsh* decision "plainly emasculated" *Fritiofson* and similar decisions and set a standard of review far more deferential to the agency. *See Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 677 (5th Cir. 1992). Like the Fifth Circuit, the Third Circuit has interpreted *Marsh* as permitting an agency to avoid an EIS despite the existence of potentially significant effects on the quality of the human environment. *Soc'y Hill Towers*, 210 F.3d at 178-79 (3d Cir. 2000). Another circuit has displayed

confusion on the point,[11] while other circuits properly interpret *Marsh* as retaining the reasoned decisionmaking standard of review. Although *Marsh* plainly retains the reasoned decisionmaking requirement, the time has come for the Court to bring clarity to this area of the law.

III. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT

This case squarely presents the standard-of-review issue for this Court's resolution. A federal agency has concluded that approving a Wal-Mart Supercenter (and the oceans of parking needed to support it), high-rise complexes, and other commercial ventures built in an historic, pedestrian-scale neighborhood of New Orleans (displacing hundreds of low-income families) does not trigger NEPA's EIS requirement, a requirement that applies to every major federal action that significantly affects the quality of the human environment. Such a strongly counterintuitive agency finding is only sustainable under a judicial standard that permits ignoring all but the most certain effects. The Fifth Circuit's decision below cannot stand if agencies are obliged to consider the likely effects of their actions.

A. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The Compatibility Issue

Only under the Fifth Circuit's highly deferential standard of review is it possible to find that a proposed Wal-Mart with a block of parking and other high-rise buildings could be "compatible" with an historic neighborhood of pedestrian scale. As noted, many opponents of the project predicted that the Wal-Mart Supercenter would seriously erode the historic character

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[11] *Compare Hill*, 144 F.3d at 1451 (requiring agency to "make a convincing case"), *with Preserving Endangered Areas of Cobb's History v. Army Corps of Eng'rs*, 87 F.3d 1242, 1248-49 (11th Cir. 1996) (upholding decision not to create EIS where agency "considered the effects").

of the neighborhood while the private developer suggested that the big-box store would fit right in.[12]

In upholding HUD's conclusion that the future consequences of the Wal-Mart Supercenter would not significantly affect the quality of the Lower Garden District neighborhood, the court emphasized that the proposed Wal-Mart would be "located on the Tchoupitoulas industrial corridor." (App. 21a.) But even HUD admitted that the Project's area of potential effects extended across the rest of the Lower Garden District, and a large portion of urban New Orleans. (*See* App. I.) In the least, then, HUD was required to consider whether the proposed project would fit into the historic neighborhood of homes and pedestrian-scale retail, and not simply – as the court of appeals did – confine its inquiry to some adjacent industrial lands.

Any meaningful inquiry would surely have revealed the likelihood that this car-centered project focusing on a huge big-box suburban style store built largely out of concrete masonry block would almost certainly dramatically alter the character of this neighborhood. Only the most agency deferential standard imaginable – one that relies on even the merest suggestion that a likely event may not occur – could possibly sanction HUD's decision that the Wal-Mart Supercenter would be compatible with a Nineteenth-Century mixed-use neighborhood.

If this case had arisen in either the First, Second, Ninth, Eleventh, or D.C. Circuits, there is no question that HUD would have had to prepare an EIS. For example, in the First Circuit's decision *Sierra Club v. Marsh*, the court refused to defer to an agency's determination that no EIS was required

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[12] (*See, e.g.*, App. 90a ("Where is the argument that there are other parking lots of that size [850 spaces] in this neighborhood or anywhere in uptown New Orleans[?]"); *id.* (noting that the masonry-block exterior of the Wal-Mart Supercenter would constitute a drastic change from the brick veneers of the surrounding historic neighborhood).

where the agency had relied on compliance with local zoning laws without considering the fact that the relevant zoning laws had to be altered to effect compliance. *See Sierra Club v. Marsh*, 769 F.3d at 880-81. As in *Sierra Club v. Marsh*, major zoning changes were necessary here because the project called for land use inconsistent with the status quo. (*See* App. 20a-21a.) HUD's decision to avoid an EIS on these facts simply could not stand under *Sierra Club v. Marsh* and similar cases. *See, e.g., Md.-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973) ("When . . . the Federal Government exercises its sovereignty so as to override local zoning protections, NEPA requires more careful scrutiny. NEPA has full vitality, and its policies cannot be taken as effectuated by local land use control, where the proposal of the Federal Government reflects a *distinctive difference in kind* from the types of land use, proposed by private and local government sponsors, that can fairly be taken as within the scope of local controls." (emphasis added)).

B. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The Collateral Effects Issue

A second way in which this case turns on the applicable standard of review concerns whether the Wal-Mart Supercenter might attract other national chains to the vicinity of the St. Thomas Project. Petitioners pointed to an economic market assessment in the administrative record showing that the Project would likely be followed by a rush of other national chain stores. *See* Appellants' Fifth Circuit Record Excerpt 8, at 1, 39. In affirming HUD's decision to ignore that possibility, the Fifth Circuit emphasized that petitioners offered "nothing concrete" to show that specific additional projects are "planned for in this particular project area." (*See* App. 29a.) Short of an actual contract with new developers showing that an influx of national chain retailers *will* occur, however, it is unclear how any litigant is to show a significant possibility that such an in-

flux *might* occur, if not through such a focused economic study predicting that it would.

The cases relied on by the Fifth Circuit to suggest that the statistics were "speculative" do nothing of the sort. Both involve the standards for assessing whether a completed EIS is sufficient, rather than whether an agency must prepare an EIS in the first instance. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989) (upholding a CEQ regulation requiring EIS to include only "reasonably foreseeable" consequences); *City of Shoreacres v. Waterworth*, 420 F.3d 440 (5th Cir. 2005) (upholding agency decision not to include in EIS unlikely event that future dredging would be required).

Again, had this issue arisen in the First, Second, Ninth, Eleventh, or D.C. Circuits HUD would have had to prepared an EIS. An economic study showing that a major federal program might cause a significant impact on the human environment would trigger the EIS requirement in those circuits. Only under the exceptionally deferential standard employed by the Fifth Circuit and its aligned circuits could a court approve of HUD's decision not to prepare an EIS despite this economic evidence of significant potential consequences to the environment.

C. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The National Historic Landmarks Issue

A third illustration that this case turns on the applicable standard of judicial review concerns the real possibility of significant adverse impacts on National Historic Landmarks. The Fifth Circuit's highly deferential decision permitted HUD to rely on another agency's decision. HUD's only basis for its no-impact finding with respect to the NHLs was the NPS opinions, for which the NPS itself disavowed any identifiable basis, cautioning HUD that "extra caution" was required because "the National Historic Landmarks are considered to be the most important historic landmarks in the United States." (*See*

App. 92a.) Nonetheless, the Fifth Circuit approved the HUD's decision to not prepare an EIS, because petitioners had not made a sufficient showing that the Project would harm NHLs. (*See* App. 40a.) By contrast, the courts of appeals that impose a meaningful standard of review will not allow an agency to avoid preparing an EIS by merely deferring to other agencies and assuming that they will prevent significant effects from occurring. *See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 1122-23 (D.C. Cir. 1971) (declaring that each agency must make an independent NEPA determination, and cannot merely defer to certification by separate agency that environmental standards are met).[13] In short, under the Fifth Circuit's approach, unless there was proof that NHLs *would* be harmed, HUD was free to ignore the possibility, and not prepare an EIS.

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[13] *See also, e.g., The Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1984) ("One agency cannot rely on another's examination of environmental effects under NEPA"); *Idaho v. ICC*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) ("Instead of taking its own hard look, the Commission deferred to the scrutiny of others by authorizing salvage subject to conditions that require Union Pacific to consult with various federal and state agencies about the specific environmental impacts that fall within their jurisdictions. An agency cannot delegate its NEPA responsibilities in this manner . . . ."); *Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 484 (D.D.C. 1994) (similar).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 03-30875

COLISEUM SQUARE ASSOCIATION, INC.,
SMART GROWTH FOR LOUISIANA,
LOUISIANA LANDMARKS SOCIETY, INC.,
HISTORIC MAGAZINE ROW ASSOCIATION and the
URBAN CONSERVANCY, INC.,
Plaintiffs-Appellants,

v.

ALPHONSO JACKSON, ETC.; ET AL.,
Defendants,

ALPHONSO JACKSON, Acting Secretary,
U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT AND HOUSING AUTHORITY OF
NEW ORLEANS,
Defendants-Appellees,

No. 04-30522

COLISEUM SQUARE ASSOCIATION, INC.,
SMART GROWTH FOR LOUISIANA,
LOUISIANA LANDMARKS SOCIETY, INC.,
HISTORIC MAGAZINE ROW ASSOCIATION and the
URBAN CONSERVANCY, INC.,
Plaintiffs-Appellants,

v.

HOUSING AUTHORITY OF NEW ORLEANS,
an agency of the State of Louisiana,
ALPHONSO JACKSON, Acting Secretary,

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Defendants-Appellees,

v.

HISTORIC RESTORATION, INC.,
Intervenor-Appellee.

Sept. 18, 2006.
Rehearing Denied Dec 13, 2006.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before: JONES, Chief Judge, and KING and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

In this case, we are called upon to decide whether the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370f, and the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470f-470x-6, require the United States Department of Housing and Urban Development (HUD) to cease federal funding for the St. Thomas Housing Development revitalization project in the City of New Orleans until the agency completes further evaluation of the project's environmental and historic preservation impacts. Because it does not appear that HUD has acted arbitrarily, capriciously or contrary to law in its study, consideration, and findings regarding the project's environmental impacts, we conclude that these statutes impose no further requirements on HUD at this time.

I.

A brief overview of the statutes and regulations creating the administrative framework, terminology and objec-

tives helps to understand the case. After describing the bureaucratic order, we then turn to the factual and procedural background.

A.

1.

"NEPA establishes a 'national policy [to] encourage productive and enjoyable harmony between man and his environment,' and was intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 756, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) (quoting 42 U.S.C. § 4321). " 'NEPA itself does not mandate particular results' in order to accomplish these ends." *Pub. Citizen,* 541 U.S. at 756, 124 S.Ct. 2204 (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)). Instead, NEPA imposes procedural requirements on federal agencies, requiring agencies to analyze the environmental impact of their proposals and actions. *Pub. Citizen,* 541 U.S. at 756-57, 124 S.Ct. 2204. NEPA's central requirement is that federal agencies must:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of longterm productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2); *see also Pub. Citizen,* 541 U.S. at 757, 124 S.Ct. 2204.

Federal agencies receive guidance in their preparation of this detailed "Environmental Impact Statement", or "EIS", from the Council of Environmental Quality ("CEQ"). Established by NEPA with the authority to issue regulations interpreting that statute, the CEQ has promulgated regulations determining what actions are subject to that statutory requirement. *See* 40 C.F.R. § 1500.3; *see also Pub. Citizen,* 541 U.S. at 757, 124 S.Ct. 2204. According to these regulations, the agency may instead prepare a more limited document, called an Environmental Assessment ("EA"), if the proposed action is categorically excluded from the requirement to produce an EIS or does not clearly require the production of an EIS. *Pub. Citizen,* 541 U.S. at 757, 124 S.Ct. 2204 (citing 40 C.F.R. §§ 1501.4(a),(b)). An EA, as compared to an EIS, should be a "concise public document ... that serves to ... [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1508.9(a). "If, pursuant to the EA, an agency determines that an EIS is not required under applicable CEQ regulations, it must issue a 'finding of no significant impact' (FONSI), which briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment." *Pub. Citizen,* 541 U.S. at 757, 124 S.Ct. 2204 (citing 40 C.F.R. §§ 1501.4(e), 1508.13).

2.

"The National Historic Preservation Act ('NHPA'), 16 U.S.C. §§ 470-470x-6, 'requires each federal agency to take responsibility for the impact that its activities may have upon historic resources, and establishes the Advisory Council on Historic Preservation ... to administer the Act.' " *Nat'l Mining Ass'n v. Fowler,* 324 F.3d 752, 755 (D.C.Cir.2003) (citations omitted). Section 106 of the NHPA requires that:

> [t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking ... shall, prior to the approval of the expenditure of any Federal funds ..., take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.
> 16 U.S.C. § 470f.

Like NEPA, the NHPA is procedural in nature. *See, e.g., Morris County Trust for Historic Pres. v. Pierce,* 714 F.2d 271, 278 (3d Cir.1983).

> It does not itself require a particular outcome, but rather ensures that the relevant federal agency will, before approving funds or granting a license to the undertaking at issue, consider the potential impact of that undertaking on surrounding historic places. As such, courts have sometimes referred to Section 106 as a "stop, look, and listen" provision.

Business and Residents Alliance of East Harlem v. HUD, 430 F.3d 584, 591 (2d Cir.2005) (citing *Ill. Commerce Comm'n v. Interstate Commerce Comm'n,* 848 F.2d 1246, 1260-61 (D.C.Cir.1988); *Pres. Coal., Inc. v. Pierce,* 667 F.2d 851, 859 (9th Cir.1982)). Much like the EA/EIS process under NEPA, section 106 upholds the NHPA's objectives "neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them." *United States v. 162.20 Acres of Land,* 639 F.2d 299, 302 (5th Cir.1981).

When a project will adversely affect a National Historic Landmark, however, section 110f of the NHPA requires an agency to "undertake such planning and actions as may be necessary to minimize harm to such landmark" to the maximum extent possible and to allow the Advisory Council on Historic Preservation ("ACHP") time to comment. 16 U.S.C. § 470h-2(f). "Federal regulations also have been promulgated to guide the historic preservation review process, including consultation with the [State Historic Preservation Officer, or 'SHPO'] and an opportunity to comment by the [ACHP]." *Vieux Carre Property Owners Residents and Associates, Inc. v. Pierce,* 719 F.2d 1272, 1281 (5th Cir.1983) (citing to 36 C.F.R. §§ 800-100.13).

B.

1.

We now turn to the factual and procedural background of this case. The plaintiffs, Coliseum Square Ass'n, Inc., Smart Growth For Louisiana, Louisiana Landmarks Society, Inc., Historic Magazine Row Association, and The Urban Conservancy, non-profit organizations representing citizens, residents and merchants in the City of New Orleans ("plaintiffs"), brought this action against HUD for judicial review, seeking declaratory judgment that HUD failed to comply with NEPA and NHPA in funding the St. Thomas Housing Development revitalization project and an injunction compelling HUD to withhold federal funds from the project until it fully complies with those statutes. The Housing Authority of New Orleans ("HANO") was originally a named defendant. Although the district court granted plaintiffs' motion to dismiss HANO from the case as a defendant, HANO later re-entered the case as an intervenor.

The St. Thomas Housing Development revitalization project calls for substantial demolition of the pre-existing St. Thomas Housing Development (St.Thomas) in New Orleans and, in its place, the construction of new low-income hous-

ing, new market rate housing, a senior care facility, and a shopping center. Prior to the beginning of the project, St. Thomas was a residential public housing complex within the Lower Garden District of New Orleans. Both the Garden District itself and many of the buildings in St. Thomas are listed on the National Register for Historic Places. St. Thomas, built between 1937 and 1949, consisted of 121 buildings (a total of 1510 residential units) covering 64 acres. By 1994, St. Thomas had become excessively run-down and crime-ridden. The Housing Authority of New Orleans initiated renewal efforts, which resulted in a plan to renovate the area covered by St. Thomas.

In 1996, HUD granted the Housing Authority of New Orleans $25 million through the HOPE IV program for revitalizing St. Thomas; the project then did not contemplate retail stores but was limited to housing units. Because of its grant of federal funds, HUD became responsible for ensuring that its financing of the revitalization project complies with the requirements of NEPA and NHPA.

In 1998, HANO enlisted a private developer, Historic Restorations, Inc. ("Historic Restorations") to assist in improving the plan. An amended redevelopment plan, submitted to HUD in 2000, included construction of new low-income housing, new market rate housing, a senior care facility, and a 275,000 square foot shopping center, the last of which was to be built on nearby, formerly industrial land. Historic Restorations hired Citywide Testing ("Citywide") to prepare environmental studies and documents for the project. By November 4, 1999, Citywide had completed studies and proposed findings for HUD in support of a proposed FONSI.

By September 2000, HUD completed the initial Section 106 review required by the National Historic Preservation Act ("NHPA"), which examined the project's impact on historical properties. Subsequently, the Housing Authority

of New Orleans, the State Historical Preservation Officer, and the Advisory Council on Historic Preservation (a federal agency) signed a Memorandum of Agreement ("MOA") for the project. Demolition began in October 2000.

HUD also completed its NEPA review in May of 2001, after reviewing and adopting the proposed EA developed by Citywide and approved by HANO: after adopting the proposed EA/FONSI, HANO forwarded it to HUD. On May 21, 2001, the acting HUD officer noted, by hand and in the space provided, that HUD had reviewed and concurred in the proposed EA/FONSI.

In July 2001, after both the MOA and environmental assessment were completed, Historic Restorations recommended that the retail component of the project be scaled back from 275,000 square feet to 199,000 square feet and obtained a commitment from Wal-Mart to become the retailer.

On September 4, 2001, after HRI publicly announced that Wal-Mart would be filling the retail space, the State Historic Preservation Officer asked to reopen the NHPA review. On September 6, 2001, all parties to the MOA agreed to reopen the NHPA process. HUD then undertook additional study, including a particular focus on the potential impact Wal-Mart might have on historic properties in the area. The additional investigation included consultation with all of the MOA's signatories as well as with the City of New Orleans and its planning commission, the State of Louisiana, the general public (including St. Thomas residents), and the project's opponents (including neighborhood groups and preservation agencies). As a result of that study, HUD expanded its assessment of the project's Area of Potential Effects to cover parts of Uptown, Mid-City, and Faubourg Marigny as well as all of the Garden District, the Lower Garden District, Irish Channel, the Central Business District, and the Vieux Carre

(better known as the French Quarter).

In July 2002, two years after demolition had begun and the project's residents had been relocated, plaintiffs filed suit. In response to the concerns raised in that complaint, HUD reopened its NEPA process to conduct further study. While the process was open, progress on the project was restricted to infrastructure work on the residential sections and work needed to address environmental conditions. After the supplemental investigation was complete, the proposed EA and FONSI went through a public comment period. On February 20, 2003, an amended MOA was signed and a new environmental assessment and FONSI were issued.

2.

At oral argument we requested additional briefs from the parties regarding whether the case had been mooted because the project was either substantially complete or effectively terminated by the adverse effects of Hurricane Katrina. After reviewing those briefs, we are satisfied that this case is not moot and that we have subject matter jurisdiction.

It is true that many significant parts of the project have been completed. The Wal-Mart shopping center has been finished and open for business since late 2004. As of late February 2005, most of the former St. Thomas housing project had been demolished. Only five buildings were left standing for future rehabilitation. The first phase of housing units had been completed; 98% of them had been rented and occupied. Infrastructure work for the entire housing portion of the site had been completed, and work had begun on ten subsidized units of offsite rental housing.

The next phase, however, consisting of the construction of 73 mixed-income housing units, was expected to begin in March 2006. Work had not yet begun on rehabilitating the remaining five buildings from the St. Thomas hous-

ing project. The following construction was planned but not yet begun: 200 mixed-income rental units, 64 affordable rental housing units for the elderly, a 250- unit market rate rental retirement community, and 200 market rate condominium units; additional small-scale commercial ventures, which may be included in some of the new residential construction; and construction or rehabilitation of affordable rental housing (90 units) and affordable individually owned houses (50 units). Hurricane Katrina generally spared the existing housing units, and they are currently habitable. HANO indicates that it plans to finish the project, but it has not determined how Hurricane Katrina's impact might change the its prior plans.

The plaintiffs in the present case challenge far more than the building demolition called for by the project. Despite the completion of the Wal-Mart complex and other edifices, significant projected construction and renovation remain unfinished. Plaintiffs' requested relief--declaratory judgments invalidating the existing MOA as well as the environmental assessment and FONSI, plus injunctions halting construction and requiring preparation of a proper and legal MOA and environmental assessment--could, if granted, eliminate or alleviate a multitude of their expressed environmental and historical preservation concerns. Accordingly, we conclude that the case is not moot and proceed to consider the merits of the plaintiffs' claims. *Cf. Benavides v. Housing Authority of City of San Antonio, Tex.*, 238 F.3d 667, 670 (5th Cir.2001) (holding a demolition project to be moot where demolition was only 55% complete, but had progressed to the point where units were no longer habitable); *Bayou Liberty Ass'n v. U.S. Army Corps*, 217 F.3d 393 (5th Cir.2000) (holding the case to be moot where construction of the project had been entirely completed); *Vieux Carre Property Owners, Residents, & Assoc., Inc. v. Brown*, 948 F.2d 1436, 1446 (5th Cir.1991) ("as long as ... [the agency] has the ability to require changes that could con-

ceivably mitigate any adverse impact the project might have ... [the project] remains a federal undertaking and NHPA review is required."). None of the parties to this suit contend that Hurricane Katrina's effects have rendered the project moot.

II.

An agency's decision not to prepare an EIS can be set aside only upon a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 375-376, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *Kleppe v. Sierra Club,* 427 U.S. 390, 412, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976). Here, HUD based its FONSI upon the analysis contained within its EA; respondents argue that the issuance of the FONSI was arbitrary and capricious because the EA's analysis was flawed for numerous reasons that we address individually later in this opinion.[1]

Under NEPA, an agency is required to provide an EIS only if it will be undertaking a "major Federal actio[n]," which "significantly affect[s] the quality of the human environment." 42 U.S.C. § 4332(2)(C). Under applicable CEQ

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[1] On April 11, 2003, in ruling on cross-motions for summary judgment, the district court concluded that HUD's environmental assessment/FONSI and MOA were not "arbitrary and/or capricious in any respect." Plaintiffs contend that the district court erred in this ruling: that HUD arbitrarily and capriciously concluded that the project would result in no significant environmental impact.

Our review of the district court's ruling on the cross-motions for summary judgment is *de novo,* "applying the same standard on appeal that is applied by the district court." *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.,* 310 F.3d 870, 877 (5th Cir.2002) (citing *Auguster v. Vermilion Parish Sch. Bd.,* 249 F.3d 400, 401 (5th Cir.2001)). Here, like the district court, we apply the "arbitrary and capricious" standard described above.

regulations, a "[m]ajor Federal action" is defined to "includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "Effects" are defined to "include: (a) [d]irect effects, which are caused by the action and occur at the same time and place," and "(b) [i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." Id. § 1508.8. It is undisputed that HUD's funding of the project is a major federal action. Thus, we must determine whether HUD acted reasonably and in accordance with law in deciding, based on its EA and FONSI, that its action had no direct or indirect effects that significantly affected the quality of the human environment. See Pub. Citizen, 541 U.S. at 763-64, 124 S.Ct. 2204.

Plaintiffs first argue that HUD's action in funding the project was not in accord with law in two respects: they assert that federal regulations automatically required HUD to produce an EIS based on the increased level of noise and the sheer number of dwellings affected by the project. In their remaining arguments, plaintiffs contend that HUD acted arbitrarily and capriciously or unreasonably because the evidence available to HUD mandated preparation of an EIS.

A.

Plaintiffs contend that CEQ regulations required HUD to prepare an EIS under the facts established by its own EA, and that HUD's major federal action of funding the project before preparing an EIS was not in accordance with law. Contrary to plaintiffs' argument, however, HUD's interpretation and application of the regulations as permitting it to proceed without an EIS in this case were not arbitrary, capricious, or clearly contrary to law. When the interpretation and application of regulations by an agency and its opponents are not arbitrary and capricious nor clearly contrary to law we are required by NEPA and the Supreme Court's deci-

sions to accept the agency's decision as being in accordance with law. *See, e.g., N. Ind. Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15, 96 S.Ct. 172, 46 L.Ed.2d 156 (1975).

HUD regulation 24 C.F.R. § § 51.104(b)(2) requires the agency to prepare an EIS prior to approving "projects with unacceptable noise exposure[,]" that is, where sound levels reach 75 decibels or greater, based on a 24-hour weighted average of sound levels. *See* 24 C.F.R. § § 51.104(b)(2).[2] In its FONSI, HUD stated that the project is in compliance with noise abatement requirements, noting that the sound measurements fall within "acceptable" levels. In doing so, HUD relied on a September 2002 noise survey included in its EA which indicates that the noise exposure (the average day-night sound level at the site) reaches 60 decibels, within the "acceptable" range. Review of that study indicates that it used measurements taken over a 24-hour period within a carefully described area, and included an assessment of the possible effects of future increased traffic and the construction of retail buildings. Plaintiffs contend that in conducting the study HUD did not comply with its own September 1991 Noise Guidebook.

The fact that HUD's submitted study did not completely comply with the requirements of its Noise Guidebook is not, of itself, sufficient to show that its reliance on the study was not in accordance with law or arbitrary and capricious. In *Lyng v. Payne*, 476 U.S. 926, 937, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986), the Supreme Court held that "not all agency publications are of binding force"--in other words, the guidelines in question must be "the kind of agency law

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[2] HUD regulations define "Acceptable" noise levels as "not exceeding 65 dB[,]" "Normally Unacceptable" levels as "[a]bove 65 dB but not exceeding 75 dB[,]" and "Unacceptable" levels as "[a]bove 75 dB." 24 C.F.R. § 51.103, table.

the violation of which is remediable at all." Generally, to be legally binding on an agency, its own publications must have been "promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *See, e.g., Schweiker v. Hansen,* 450 U.S. 785, 789-90, 101 S.Ct. 1468, 67 L.Ed.2d 685, (holding Social Security Administration Claims Manual is not binding agency rule); *Fano v. O'Neill,* 806 F.2d 1262, 1264 (5th Cir.1987) (holding INS Operations Instructions not binding because "they are not an exercise of delegated legislative power and do not purport to be anything other than internal house-keeping measures."); *W. Radio Servs. Co. v. Espy,* 79 F.3d 896, 900-01 (9th Cir.1996) (holding that the court reviews noncompliance with an agency "pronouncement" only if it "actually has the force and effect of law."); *Gatter v. Nimmo,* 672 F.2d 343, 347 (3d Cir.1982) (holding Veteran's Administration publications not binding because they were not promulgated under the APA's rulemaking requirements); *Fed. Land Bank in Receivership v. Fed. Intermediate Credit Bank,* 727 F.Supp. 1055, 1058 (S.D.Miss.1989) (holding that directive not promulgated according to APA procedure lacks force and effect of law); *see also Davis Mountains,* 116 Fed.Appx. 3, 9-10 (5th Cir.2004) (summarizing above case law and holding as result that the Air Force's Handbook is not binding as it was not promulgated according to the APA's procedural requirements). Where agency publications have not been so promulgated, the agency's decision to analyze impacts by other methods is not an automatic violation of the law. As such, it is subject to review under the normal "arbitrary and capricious standard" used to review agency action under the APA. *Davis Mountains,* 116 Fed.Appx. at 9-10 ("Thus the Air Force retained discretion to analyze impacts on livestock by methods other than those contained in the Handbook, and we must address the adequacy of the Air Force's chosen method according to the arbitrary and capricious standard"); *see also Communities Against Runway Expansion, Inc. (CARE) v.*

F.A.A., 355 F.3d 678, 688 (D.C.Cir.2004) (holding that even though an executive order mandating agency consideration of environmental justice concerns created no private right of action for an agency's failure to comply with that mandate, the court would review the agency's action as an exercise of discretion under the APA and NEPA). Here, plaintiffs neither argue nor offer evidence that HUD's guidelines were promulgated under the Administrative Procedure Act's procedural requirements. Plaintiffs's first argument therefore fails: HUD has not acted contrary to law by using methodology different from that contained in the Guidebook.

Plaintiffs also argue that HUD "obviously skewed [the study] to measure disproportionally during the quietest times of the day and bring the overall average decibel level down." Similarly, they appear to assert that HUD was arbitrary and capricious in not relying on the results of an extra-record noise survey completed in April 2001 by Citywide. They claim that HUD's chosen methodology improperly and purposely skews the survey results by including a measurement at noon, but no measurements between 7:30 A.M. and 12:06 P.M. nor between 11:46 A.M. and 2 P.M. They offer conclusory allegations that HUD's sampling survey produces distorted results and was conducted in that manner for the express purpose of avoiding the conclusion suggested by the extra-record Citywide survey.

At best, this argument reflects only a disagreement over whether it was arbitrary and capricious for HUD to base its decision on the study documented in the record rather than extra-record evidence. There is simply no evidence of bad or improper motive by HUD in this instance. Nor do plaintiffs provide further evidence showing either that reliance on such a methodology is otherwise arbitrary and capricious or that HUD's methodology was actually flawed, rather than simply different from plaintiff's preferred method. In fact, the Citywide study on which plaintiffs would urge reli-

ance does not comply with HUD regulations, which the agency must obey, let alone the Noise Guidebook's non-binding requirements.[3] The Citywide survey hardly amounts to persuasive evidence of noise levels that require an EIS under the HUD regulations. We may not, therefore, say that HUD arbitrarily and capriciously relied on the study's results in determining that the noise levels did not trigger the automatic environmental impact statement requirement.

Plaintiffs next argue that HUD's funding of the project without preparing an EISs was contrary to a CEQ regulation mandating an EIS when a project will "remove, demolish, convert, or substantially rehabilitate 2,500 or more existing housing units ... or ... result in the construction or installation of 2,500 or more housing units." 24 C.F.R. § 50.42(b)(2). Plaintiffs argue that this regulatory provision must be read expansively and cumulatively: that is, that each demolition of an old housing unit and each construction of a new housing unit should be counted cumulatively toward the 2,500 limit or trigger. Thus plaintiffs contend that, if a project proposes to destroy 1,250 old units and construct new 1,250 units in their place, an EIS is required because this would involve the destruction or construction of 2,500 units. HUD reads the regulation as disjunctively establishing two categories: demolition, conversion or rehabilitation of the old *vis-à-vis* construction or installation of the new; as applied to this case, HUD reasons that, since only 1,510 units are to be demolished or rehabilitated and only 1,282 are to be newly constructed or installed, the project does not reach the 2,500 unit trigger in respect to either category.

Plaintiffs effectively concede this point. They do not argue or attempt to show that HUD's interpretation is arbi-

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[3] As an example, the proffered extra-record survey took its measurements over a 12-hour period; 24 C.F.R. § 51.103(a), by contrast, requires measurements over a 24-hour period.

trary and capricious. Instead, they contend, without explanation, that we should not defer to the agency's reasonable interpretation as precedent would require, but that we ought to use our own judgment to declare that their interpretation of the regulation will be followed because it is simply the best. Even if we were to agree, however, we do not have the plenary authority to interpret the regulation in this kind of case as we personally deem best. "In situations in which 'the meaning of [regulatory] language is not free from doubt,' the reviewing court should give effect to the agency's interpretation so long as it is 'reasonable,' that is, so long as the interpretation 'sensibly conforms to the purpose and wording of the regulations.' " *Martin v. Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 150-51, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) (quoting *Ehlert v. United States,* 402 U.S. 99, 105, 91 S.Ct. 1319, 28 L.Ed.2d 625 (1971) and *N. Ind. Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of America, Inc.,* 423 U.S. 12, 15, 96 S.Ct. 172, 46 L.Ed.2d 156 (1975)). Because the plaintiffs effectively concede that HUD's interpretation of the regulation is not unreasonable, we conclude that the regulation does not require an EIS in this case and that HUD did not fail to act in accordance with law in this respect.

B.

The theme of plaintiffs' remaining NEPA arguments is that HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project would significantly affect the quality of the human environment in many different ways. We address each argument under a separate heading. Before we begin, we pause to reiterate that in attacking a decision not to prepare an EIS, "more than an allegation of deficiencies is necessary; the *plaintiffs* must prove the essential allegations of their complaint by a preponderance of the evidence." *La. Wildlife Fed'n, Inc. v. York,* 761 F.2d 1044, 1055 (5th Cir.1985)

(Rubin, J., dissenting). "It is the burden of the plaintiffs to adduce evidence, not merely to make allegations or to rest on assumptions, establishing that the Corps was [arbitrary and capricious] in reaching the conclusion it did[.]" *Id.*

1. Environmental Justice

Executive Order 12898 instructs agencies to consider the environmental justice impacts of their actions. Exec. Order No. 12898, 59 *Fed.Reg.* 7629 § 6-609 (1994). The Order does not, however, create a private right of action. Thus, we review the agency's consideration of environmental justice issues under the APA's deferential "arbitrary and capricious" standard. *See, e.g., Communities Against Runway Expansion, Inc. (CARE) v. F.A.A.*, 355 F.3d 678, 688 (D.C.Cir.2004). Leaving aside legalisms, we see in this record no administrative insensitivity to racial or economic inequality. Instead, we see a project that HUD perceived reasonably as a community effort, endorsed initially by some who now oppose it, to renovate a deteriorating public housing project for the ultimate and enduring benefit of the community.

HUD's environmental justice study, completed in September 2002, looked at the area in which the project is being built and determined that those who return to live in the "new" St. Thomas will benefit from safer, more sanitary living conditions and an improved economic environment. It considers the problems of displacement, including the fact that residents still living in the project would be eligible for relocation under the Uniform Relocation Act. Furthermore, HUD's study reflected that St. Thomas residents had numerous complaints about the housing project and were at risk from pest infestations, asbestos, drug paraphernalia, lead exposure, and raw sewage. It notes, based on the comments received from then-residents, that many had complaints about the St. Thomas development and while some would stay there if conditions and amenities were improved, others

would prefer to become home owners outside of the project. Over 200 lawsuits had been filed over lead exposure in the housing units, and that 99% of residents belonged to a minority group.

The record also indicates that HUD received and responded to comments made at a public meeting by Mr. Brod Bagert, whose master's thesis had been highly critical of the HOPE IV program, and of the broader "market revitalization" approach to improving urban areas. His comments and his study use the St. Thomas project as an example to attack that particular theory of urban planning. HUD responded to Mr. Bagert's comments, indicating that while it understood the basis of his criticism of the HOPE IV approach to urban revitalization, the HOPE IV approach is clearly supported by Congressional mandate.

Plaintiffs offer Mr. Bagert's comments, and evidence of problems with residential relocations under the Uniform Relocation Act, for the proposition that HUD's evaluation of the project's impacts is entirely contradicted by the evidence.[4] The record in front of us is hardly so clear cut, and certainly reveals that HUD gave attention to the issues plaintiffs raise, for all they disagree with the conclusions. Beyond their allegations and Mr. Bagert's comments, which HUD clearly took under consideration, plaintiffs offer no evidence suggesting that the environmental justice study was arbitrary or capricious in its choice of methodology. We cannot, therefore, say that they have met their burden of showing that HUD's consideration of environmental justice concerns

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[4] Mr. Bagert's written report is outside the record. The district court denied plaintiffs's request to add it as a supplement to the administrative record. Plaintiffs challenge that ruling by the district court's decision only in response to its ruling on their Rule 59 motion, discussed *infra*. For the purposes of the immediate analysis, we are confined to the administrative record, which includes only Mr. Bagert's oral comments at a public meeting.

was arbitrary and capricious.

2. Zoning

The New Orleans City Council approved zoning changes for the project in November 2001 (for the retail portion) and in April 2002 (for the residential portion). In addition, implementing the St. Thomas revitalization project required the creation of a Tax Increment Financing District, which helps fund the project, and which was highly controversial with regard to its possible negative economic effect on local businesses near the project. In preparing the environmental assessment, HUD indicated only that the project was in compliance with local zoning ordinances by the time of the assessment, without indicating that such compliance actually required changing the local zoning laws. In addition, when describing the two twelve-story residential buildings and the 200,000 square-foot Super Wal-Mart retail center, HUD indicated on the environmental assessment form that the project was compatible with its surroundings in terms of land use, building type, height, bulk and mass, and density.

Plaintiffs challenge HUD's conclusion that local zoning changes implemented for the project do not create a significant environmental impact. First, plaintiffs assert that "[l]ocal zoning changes significantly impact the human environment[;]" but offer little support for their arguments. They offer *Sierra Club v. Marsh,* 769 F.2d 868, 872 (1st Cir.1985), for the proposition that an EIS is automatically required where the project radically alters existing land use, but we find that case inapposite. There, the court held that the Federal Highway Administration and Army Corps of Engineers could not support its FONSI by relying on land use regulations to safeguard the land because the project would radically alter land use. *Id.* Here, although HUD does cite to its compliance with local zoning ordinances as support for its FONSI, we have no change so radical as to be akin to replac-

ing an undeveloped wooded island with a marine terminal and industrial complex, as was proposed in *Marsh.* Thus *Marsh* offers us no such legal rule, nor do plaintiffs offer us support for drawing an analogy on the facts. The project in the case at bar, particularly the high-rise structures and the Wal-Mart center, is located on the Tchoupitoulas industrial corridor, and the remaining residential portion borders the nearby residential areas. Without further evidence supporting their allegations, we may not hold that HUD was arbitrary and capricious in determining that the zoning change of itself implied that the project would have a significant impact on the environment.

Second, plaintiffs assert that the implementation of the Tax Increment Financing District was a highly controversial change, such that it requires an environmental impact statement under the regulations set out by the Council on Environmental Quality. *See* 40 C.F.R. § 1508.27(b) (identifying a project's "highly controversial" nature as a factor to consider in evaluating the intensity of impacts). We have held that these factors listed in the regulation "do not appear to be categorical rules that determine by themselves whether an impact is significant." *Spiller,* 352 F.3d at 243. "As such, all that would have to be shown is that all the factors were in some way addressed and evaluated; whether this was done in factor-by-factor fashion is irrelevant." *Id.* Furthermore, "controversial" is usually taken to mean more than some public opposition to a particular use--rather it requires "a substantial dispute ... as to the size, nature, or effect of the major federal action." *See Center for Biological Diversity v. U.S. Fish & Wildlife Service,* 202 F.Supp.2d 594, 657-58 (W.D.Tex.2002) (summarizing existing case law with regard to what constitutes a "substantial dispute" such that an environmental impact statement is required). Reviewing the record, the portions to which plaintiffs cite clearly reflect public opposition from local businesses to using the retail space to house a Wal-Mart, but do not attack the broader nature or

effect of the project as a whole. The record clearly reflects that HUD addressed and evaluated this factor and plaintiffs do not adduce evidence suggesting that its evaluation was insufficient, but simply assert disagreement with the conclusion. Accordingly, they have not met their burden to show that HUD acted arbitrarily or capriciously.

3. Businesses Occupying Historic Buildings

CEQ regulations require agencies to discuss economic factors where interrelated with NEPA environmental considerations; such factors include the impact on "uniqueness of historic resources" and "adverse impacts on National Register properties". *See* 40 C.F.R. § § 1508.14 (requiring examination of interrelated effects), 40 C.F.R. § 1508.27 (list of NEPA intensity factors contributing to the determination of "significant impact" on "uniqueness of historic resources" and "adverse impacts on National Register properties"). As a result, HUD built into its EA an assessment of the project's impact on businesses occupying historic buildings.[5]

In reaching its FONSI on the issue, HUD relied on a broad range of information, including opinion polls, newspaper articles, and other studies-- notably, the Lambert Advisory Report. This last indicates that Wal-Mart will reduce some sales from local businesses, but also suggests that Wal-Mart may actually help the area retain some revenue which had previously left the city in favor of suburban retail. Other documents in the record are equally clear in identifying both the increase in competition posed by Wal-Mart as well as its potential economic benefits to existing retailers. HUD's ad-

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[5] HUD attempts to argue that even though it did consider this issue, NEPA does not require such a examination of "purely economic" impacts. The merit of this argument is dubious, since, as plaintiffs note, the loss of businesses in the district relates to the amount of money available to maintain historic buildings.

ministrative record also includes an inventory of area businesses (the "Blick inventory"), which is an admittedly "quick review" and contains errors, particularly in its characterization of what goods or services varying businesses provide.

Plaintiffs argue that HUD's reliance on the Blick inventory as "sole support" for its statement will not suffice in order to support a FONSI. Although their argument might have carried weight if the Blick inventory was HUD's sole source of information, HUD in fact considered information from a wide range of sources, which led it to conclude that although the Wal-Mart will bring increased competition to the area, adding the business to the area was also likely to result in an increase in economic opportunities for local retailers. Furthermore, plaintiffs simply misstate the record when they assert that HUD entirely ignored the Lambert report. Finally, plaintiffs proffer an alternative, extra-record inventory of local businesses. Beyond simply restating that study's conclusions, which are more favorable to their desired outcome, plaintiffs offer no evidence that would allow us to conclude that its methodology is any more reliable or its results any more robust than the studies HUD included in the administrative record. As a result, we cannot say that plaintiffs have met their burden in showing that HUD acted arbitrarily or capriciously.

4. Toxic and Hazardous Waste

HUD regulations do not permit that agency to approve projects that are not located an acceptable distance from "hazards" unless appropriate mitigation measures are taken. 24 C.F.R § 51.202(a). "Hazards" are defined to include any "any stationary container which stores, handles or processes hazardous substances of an explosive or fire prone nature." 24 C.F.R. § 51.201. Accordingly, HUD's EA included an investigation into whether any such hazards threatened the St. Thomas project as a part of the process. It conducted two Phase I assessments, which identified certain

toxic and hazardous waste issues, including both an underground storage tank containing petroleum products and a fuel pump, both located on the Wal-Mart site. A later Phase II assessment recommended methods for remediation, and in mitigation HUD required Historic Renovation, the developer, to set up an escrow account to ensure remediation. The environmental assessment openly discusses the presence of these hazards in the comments to the section on "toxic chemicals and radioactive materials." Those remarks clearly reflect the need for a Phase II assessment, the presence of an underground storage tank, and the remediation requirements. HUD's actions comply with their regulations, and are not arbitrary or capricious in this respect.

Plaintiffs accuse HUD of violating its duty to disclose the existence of an underground storage tank by failing to disclose it in the section of the environmental assessment meant to identify "hazardous industrial operations". Their brief chargesthat HUD purposely committed deception by not listing the hazards in that section, and did so with the sole purpose of avoiding the preparation of an EIS. They offer no evidence that HUD's required remediation is insufficient to warrant a FONSI, nor any evidence to support their claims of bad faith. Nor do they offer any legal argument that the hazards must be listed in that specific section of the form, rather than in the location HUD placed it. In fact, the record reflects that the EA clearly reveals that the hazards are present and indicates the remediation planned to reduce the effects of those hazards. As a result, plaintiffs have not made any showing that HUD engaged in purposeful concealment or arbitrarily relied on the remediation measures in reaching its FONSI.

5. Lead Contamination

24 C.F.R. § 50.3(i)(1) requires that HUD must ensure its projects are free of "hazardous materials, contamination, toxic chemicals and gasses, and radioactive substances"

that would "affect the health and safety of occupants or conflict with with the intended utilization of the property." In doing so, HUD must pay "particular attention" to industrial sites and other areas containing hazardous waste, using "current techniques by current professionals." 24 C.F.R. § § 50.3(i)(2), (3). As a part of its EA process, therefore, HUD considered whether the project area had significant lead contamination. We hold that the agency was not arbitrary or capricious in determining that the environmental impact from lead in the soil was not significant.

The agency hired a contractor, PSI, to carry out the Phase II environmental assessment already mentioned above; as a part of that work, PSI took various soil samples. The contractor was particularly concerned with lead in the soil coming from underground storage tanks and old dry-cleaning facilities. When it tested the samples, PSI found that the levels of lead in the soil were below the health-based limit set by the Louisiana Department of Environmental Quality. Based on those results, HUD determined that the environmental impact from lead in the soil was not significant.

HUD later received public comments on its separate environmental justice study from a soil expert, in response to a statement in that study that surface lead contamination in the project was not a problem. The expert stated that his soil surveys for lead contamination in New Orleans found that the St. Thomas community was one of "the most contaminated areas in the city" and "recommended concerted effort" to address the problem. On receipt of those comments, and in light of the PSI results, HUD asked C-K Associates, the contractor that had prepared the environmental justice study, about the effect of those remarks on the EA. C-K Associates responded by saying that although the expert was well-respected in his field, his methodology did not follow the standards HUD required for evaluating lead levels. Given that the PSI tests had shown lead levels below the permissi-

ble maximum and that the outside expert's methods did not meet agency requirements, HUD maintained its conclusion that lead contamination at the site was not significant for the purposes of the EA.

Plaintiffs disagree mightily with PSI's technique and clearly prefer the outside expert's methodology, urging that HUD arbitrarily and capriciously relied on PSI's unsound techniques. The mere fact of HUD's reliance on the PSI study is not arbitrary and capricious. We have held that "[an] agency is not required to 'do it alone' " in reviewing the environmental impact of projects, and may employ outside consultants in preparing an environmental assessment. *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 642 (5th Cir.1983). "The intent of the controlling regulations is that 'acceptable work [completed by parties outside the agency] not be redone[.]' " *Id.* (citing 40 C.F.R. § 1506.5(a)). Furthermore, "an agency must have discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *see also, Mississippi River Basin Alliance v. Westphal,* 230 F.3d 170, 175 (5th Cir.2000); *Sabine River,* 951 F.2d 669, 678 (5th Cir.1992). An agency may not, however, "reflexively rubber stamp" information prepared by others. *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 643 (5th Cir.1983) (citing *Sierra Club v. Lynn,* 502 F.2d 43, 58-59 (5th Cir.1974)); *Sierra Club v. Sigler,* 695 F.2d 957 (5th Cir.1983).

On this record, we find that plaintiffs have not shown that either HUD's reliance on PSI's study or PSI's methodology were arbitrary and capricious. HUD's administrative record, however, clearly reflects that when public comment called possible flaws in PSI's methods or results, HUD inquired into the problem and, on consideration of the evidence, chose to continue to rely on PSI for sound reasons. In

support, plaintiffs can only point to the results of the outside study and the soil expert's comments. As C-K Associates noted, however, HUD could not rely on plaintiffs' preferred method without violating its own standards. Furthermore, the soil expert's comments state only that the project has the highest lead contamination in New Orleans, and do not contradict PSI's findings that the lead-levels are within of health-based standards. Beyond their allegations and the above comparisons, plaintiffs offer no concrete evidence to support their arguments. Accordingly, we conclude that HUD was neither arbitrary nor capricious in relying on PSI's conclusions in reaching its FONSI.

6. Traffic

When studying the project's potential effects, HUD looked at the possible impacts of increased traffic. A September 2001 traffic study examined streets and major intersections in the project--locations where it thought any increase would likely cause problems. A second study, carried out in December 2002, looked at the effect traffic increases would have in areas outside of that already covered by the original study. HUD also carried out noise and vibration studies, and included traffic as a factor in its environmental site assessments, environmental justice study, and mitigation requirements. The New Orleans Department of Public Works and the Regional Planning Commission also studied traffic impacts and concluded that the effects would not be significant. On the record before us, which includes all of the above, we hold that the agency did not arbitrarily or capriciously reach its FONSI with regard to traffic.

Plaintiffs attempt to whittle away at HUD's support for its findings. They assert that HUD relies solely on the December 2002 study to reach its conclusions. The 2002 study, they allege, covers only outlying areas and therefore cannot, alone, support HUD's determination. Their characterization of the record is simply inaccurate: as recounted

above, HUD relied on far more than just that study, and in fact made certain to incorporate traffic effects into its study of other potential impacts as well. Second, plaintiffs urge that the bare fact that HUD predicts a 67% increase in traffic should suffice for any impacts of that traffic to be automatically "significant" for NEPA purposes. will have *per se* significant effect. They offer us no legal authority for the proposition that a predicted increase should be considered *de facto* significant. Moreover, while plaintiffs allege a long list negative effects on health, safety, noise, pollution, vibration, and historic properties, they offer us no evidence as to what those effects would be, why they would be significant, or how HUD has failed to investigate them. In addition, the record described above belies the assertion that these effects have gone unstudied in HUD's EA. As a result, we may not say that HUD's decision was arbitrary and capricious in this regard.

7. Cumulative Impacts

Plaintiffs argue, in effect, that HUD should be charged with constructive knowledge of significant foreseeable cumulative effects upon human environment that were discoverable upon reasonable investigation. They beg the question, however, by assuming without demonstrating with concrete supporting evidence that the significant effects they allege were reasonably foreseeable at the time of HUD's EA/FONSI.

The plaintiffs assume that it was reasonably foreseeable to HUD that the project would cause two types of significant environmental effects: 1) future unspecified impacts caused by the influx of additional national retailers attracted by Walmart's presence and 2) future impacts of increased traffic from the above combined with future impacts by three other planned expansions in the area.[6] Although the plaintiffs

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[6] Namely, the future expansion of the Morial Convention Center, the

have not established either the foreseeability or the significance of these effects, we discuss them briefly:

First, NEPA requires HUD to study a project's reasonably foreseeable effects. Plaintiffs' sole allegation is that HUD failed to study the detrimental effects of the eventual arrival of other, unknown national retailers into the area, following Wal-Mart's wake. They offer nothing concrete to suggest that such changes will likely occur or are planned for in this particular project area, but rely on broad statistical data discussing general national trends. However, reasonable foreseeability under NEPA "does not include [such] 'highly speculative harms[.]' " *City of Shoreacres v. Waterworth,* 420 F.3d 440, 453 (citing *Methow Valley Citizens Council,* 490 U.S. at 356, 109 S.Ct. 1835). As a result, plaintiffs' arguments fail.

Second, after studying the anticipated effects of increased traffic, HUD decided that the project would not cause traffic levels that would significantly affect human environment. In reaching its decision, HUD relied on two traffic studies performed by a contractor in December 2000 and September 2001. The latter was performed specifically to incorporate the effects of known plans for other development projects in the area. HUD relied on the traffic studies' projection of traffic conditions subsequent to completion of the St. Thomas revitalization project and the three other planned expansions. The studies indicated that traffic levels would remain well below capacity. HUD's reliance on those results was not arbitrary, capricious or unlawful, and plaintiffs' argument to the contrary lacks merit.

In support of their position, plaintiffs cite to inconsis-

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expanded terminal activities at the Port of New Orleans, and the development of the Saulet Apartment complex.

tencies in background traffic measurements; noting that the September 2001 measurement for Jackson Avenue is lower by 3,600 cars than the December measurement, and arguing that the September 2001 measurement is purposely skewed in order to support the FONSI. First, plaintiffs provide nothing but conclusory allegations to support their claims of bad faith. Second, we note that HUD's findings relied on a separate set of measurements, different from the challenged background traffic measurements, that specifically reflect the potential road conditions after the completion of the St. Thomas project and the four other planned activities. Furthermore, we note that even if the higher, December 2001 measurement for Jackson Avenue is taken as correct, the street is still predicted to operate at some 30,000 cars below capacity. As a result, we cannot say, on this record, that plaintiffs have adequately supported their allegations of significant foreseeable cumulative effects on human environment due to increased traffic caused by the project.

8. Mitigation

In reaching its FONSI, HUD relied in part on the mitigation requirements contained in the MOA developed as a part of required NHPA planning. On examination, we find that HUD did not rely on them arbitrarily or capriciously. The MOA's requirements were meant to alleviate adverse impacts on historic properties; many of its mitigation requirements focused on reducing the adverse effects on increased traffic on those properties. The measures are extensive, including "design review of new construction, rehabilitation of historic buildings, use of Belgian blocks to slow traffic at multiple intersections, and restriction of the entrance of truck traffic to Wal-Mart to Tchoupitoulas and Josephine Streets[.]" The MOA also requires the signatories to the MOA to ask the City to convene a traffic task force, seek funding for improvements to Jackson Avenue, and identify grants for local retailers. Furthermore, the MOA binds the Housing Authority of New Orleans and HRI to its terms.

Any attempt to change it requires consultation with and approval by all signatories, including federal and state agencies set up to protect historic areas. To reiterate, HUD is bound to adhere to the MOA's requirements, and may not relax or abandon them without the express authorization of all parties.

Plaintiffs argue that the above requirements will not provide the predicted mitigation, and that HUD's reliance on them is arbitrary and capricious. Plaintiffs characterize the mitigation as requiring merely letter-writing, mild research, and limited consultation. Furthermore, plaintiffs argue that the MOA has no teeth, as it can be changed at any time. Again, plaintiffs assume without demonstrating that such measures of mitigation are inherently unreliable and that an agency cannot reasonably base its decision to forgo an EIS, in part, upon them. The record before us, however, does not support their allegations. They have not, therefore, shown that HUD relied on those mitigation requirements arbitrarily or capriciously.

9. Evaluation of Project Costs and Benefits

CEQ regulations state that "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1). Plaintiffs argue that HUD is required to produce an EIS even though the project has no significant negative environmental effects, so long as it has significant positive environmental effects. This court has rhetorically considered the question, but has not arrived at an answer. *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 426-27 (5th Cir.1973) (*disavowed on other grounds*). We need not do so here, as HUD has not asserted nor have plaintiffs offered evidence of a significant positive environmental impact; HUD only indicates that when the overall benefits of the project are weighed against the temporary inconveniences of construction and any "partial long term market disruption[,]" the St. Thomas

project "provides a very positive net benefit to the community." Moreover, the other case in this circuit touching on the question can be distinguished on the grounds that it determines only whether an EIS need discuss positive benefits. *Environmental Defense Fund v. Marsh,* 651 F.2d 983, 993 (5th Cir.1981). Without more, we may not find HUD arbitrary and capricious in this regard. Plaintiffs also urge that HUD improperly subtracted the project's positive environmental impacts from its negative environmental impacts, so that once significant negative effects became insignificant. The record before us is clear, however, that HUD has not engaged in any such weighing. Rather, it evaluated the potential negative effects and determined that they are not significant, either individually or cumulatively. Again, without further support, we may not say that HUD's assessment was arbitrary and capricious.

10. Consideration of Context and Intensity

Council on Environmental Quality regulations require an agency to consider both "context" and "intensity" when considering whether an effect is "significant". 40 C.F.R. § 1508.27 (defining "significantly" as used in NEPA's statutory language). In considering context, an agency must look at "the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). When evaluating intensity, agencies should consider ten areas, listed in 40 C.F.R. § 1508.27(b). This court has held that "the factors listed in the regulation do not appear to be categorical rules that determine by themselves whether an impact is significant." *Spiller,* 352 F.3d at 243. Rather, the regulation provides a list of "relevant factors ... [for] gauging whether an impact is 'intense'[.]" *Id.* An agency must only show that each factor was "in some way addressed and evaluated." *Id.*

First, with regard to intensity, our discussions in

various sections above have repeatedly concluded that HUD built in context consideration to its examination of a wide range of impacts, particularly with regard to environmental justice, zoning, businesses occupying historic properties, and traffic. In addition, those same discussions touch on HUD's consideration eight of the ten factors that Council on Environmental Quality regulations require agencies to consider regarding the intensity of a project.[7] Plaintiffs allege that their mere presence is reason enough to require an environmental impact statement. As support, plaintiffs offer arguments that reiterate those discussed in the sections above. As noted, the listed factors do not constitute categorical rules such that their presence or absence means an impact is *per se* significant. *See Spiller v. White,* 352 F.3d 235, 243 (5th Cir.2003). HUD must therefore show only that it addressed and evaluated these factors, even if it did not do so in a "factor-by-factor fashion" *Id.* We have concluded, in the preceding subsections, that HUD has not acted arbitrarily and ca-

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[7] Namely, the following sections of 40 C.F.R. § 1508.27(b):

(1) Impacts that may be both beneficial and adverse ....

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks. (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

priciously in its evaluation of the project's context nor in its assessment of various individual intensity factors. Similarly, we now conclude that its overall evaluation of the project's context and intensity as a whole neither arbitrary or capricious.

Plaintiffs arguments on these points largely rehash the arguments they raised individually above, and we will not repeat our analysis of them here. Their only new arguments relate to traffic and to potential adverse effects on historic resources. They first argue is that the impacts of traffic were sufficiently controversial and uncertain that HUD was required to prepare an EIS. *See* 40 C.F.R. § 1508.27(b)(4). They adduce no evidence on this point, however, beyond their own opposition to the project and the same assertions we disposed on in our analysis *supra,* in discussing traffic impacts and cumulative impacts. As they have not met their burden of proof as to the broader controversy of traffic impacts, and since we above held that HUD's consideration of traffic issues was neither arbitrary nor capricious, we now do not find HUD's behavior arbitrary and capricious in this regard.

Second, plaintiffs argue that HUD did not properly consider the project's potential adverse effects on historic properties, as required by 40 C.F.R. § 1508.27(b). These arguments are similar to those they raise challenging HUD's findings under the NHPA review process, discussed *infra,* and we reject them for the same reasons: HUD has prepared a valid Memorandum of Agreement that the consulting parties have agreed adequately resolves the project's potential adverse effects on historic properties, and was not arbitrary and capricious in determining that no National Historic Landmarks were adversely affected. *See* 16 U.S.C. § 470h-2(i) (stating that the NHPA shall not "be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required" under

NEPA.).

11. Conclusion

Plaintiffs have raised numerous objections to HUD's EA and FONSI, but plaintiffs have failed to demonstrate in any instance that HUD acted arbitrarily, capriciously, or contrary to the law in deciding that the project did not cause significant effects to human environment.

III.

Four National Historic Landmarks are located in the St. Thomas project's Area of Potential Effects: the Garden District, the Vieux Carre, St. Alphonsus Church, and St. Mary's Assumption Church. Other historic properties are also located near and in the project site. Under NHPA § 106, HUD is required to consider the effects of its actions on these historic properties by the National Historic Preservation Act. As under NEPA, an agency's actions under the NHPA are procedural, and our review of its decisions is conducted under the Administrative Procedure Act's "arbitrary and capricious" standard. *Vieux Carre Property Owners, Residents, & Assocs. v. Brown,* 875 F.2d 453, 456 (5th Cir.1989).[8]

A federal agency, the Advisory Council of Historic Preservation ("ACHP") has promulgated regulations that require federal agencies to examine whether a proposed project "has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). Where an agency proposes a finding of

[8] These challenges arise out of the same cross-motions for summary judgment as the NEPA claims discussed *supra.* Plaintiffs contend that the district court erred in ruling that HUD arbitrarily and capriciously concluded that the project would result in no adverse effects to historic properties. Again, we review the district court *de novo* on this point. *See Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.,* 310 F.3d 870, 877 (5th Cir.2002) (citing *Auguster v. Vermilion Parish Sch. Bd.,* 249 F.3d 400, 401 (5th Cir.2001)).

no adverse effect, it indicates that the project has no effect on any historic property that "diminish[es] the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(b) (read in conjunction with (a)(1)). Such a finding triggers a "consulting party review", described in 36 C.F.R. § 800.5(c).

If the agency finds that historic properties will suffer adverse effects, the agency must consult with the ACHP and the State Historic Preservation Officer ("SHPO") and other parties "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." *See* 36 C.F.R. § 800.5(a) (requiring agencies to assess adverse effects); 36 C.F.R. § 800.6(a) (requiring consultation). If adverse effects are found, and the agency, the SHPO, and the ACHP (plus any other required parties) may agree on a method of resolving those effects, to be recorded in a Memorandum of Agreement that specifies the manner of resolution. 36 C.F.R. § 800.6(b)(1)(4).

As in respect to environmental effects under NEPA, however, an agency has no duty to abandon or modify a project if the project is found to have an adverse effect that is not avoided or mitigated, but only to follow the mandated NHPA procedures.[9] 36 C.F.R. § 800.6. There is an exception to that rule applicable to National Historic Landmarks, as specially designated historic properties. They are subject to more stringent requirements. When an agency action will cause a direct adverse effect to a National Historic Landmark, the agency has an affirmative duty under NHPA § 110f to minimize the harm done. *See also* 36 C.F.R. §

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[9] Note that in many cases, as here, NHPA review is often built into the NEPA review process. *See* 36 C.F.R. § 800.8(c) (permitting such combination).

800.10(a)

Plaintiffs raise two challenges to HUD's compliance with the NHPA: 1) that HUD's compliance with the NHPA § 106 process was defective and 2) that HUD had, and neglected to fulfill, a duty to minimize direct harm to National Historic Landmarks under NHPA § 110f. We deal with each in turn.

A.

Based on its finding that the St. Thomas project would result in some adverse effects, HUD went through the required consulting process with the SCHP, ACHP, and other required parties. HUD originally produced an MOA for the project in September 2000; no one challenges the fact that HUD was not a signatory to that document, and that as a result it may not have met the NHPA's requirements. *See* 36 C.F.R. § 800.6(c)(1)(I). In September 2002, however, HUD reopened its NHPA review, which resulted in a second, final MOA. The second MOA covers more of the project than the first MOA, which covered the residential portions of the project and rehabilitation of the five remaining St. Thomas buildings. The second document covers all of the above, plus the Wal-Mart site and a nearby historic property, the Amelia Cotton Press. The document is signed by all necessary parties and contains various provisions meant to mitigate the project's effects on historic properties.

Plaintiffs argue that HUD's failure to sign the first MOA taints the validity of the second MOA. They assert that the second document can only be taken to cover the Wal-Mart and the Amelia Cotton Press and that, as a result, HUD has not adequately considered adverse effects on historical properties arising from the residential and rehabilitation portions of the project. We are not persuaded.

Plaintiffs offer no legal authority to suggest that the

second MOA may not incorporate and bind the parties to, among other things, the same terms that had been included in the first, incomplete or deficient document. Second, a plain reading of the final MOA shows that it covers the effects of and mitigation for the entire project. Plaintiffs offer no evidence that the document is meant to be interpreted in the limited fashion they urge. Accordingly, we adhere to the general rule that, absent other evidence, "[a] memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106." 36 C.F.R. § 800.6(c). Plaintiffs cannot, therefore, show that HUD was arbitrary or capricious in relying on the second, final MOA as proof of its compliance with the requirements of NHPA § 106.

Plaintiffs' second argument asserts that HUD was required to undertake the "consulting party review" process laid out in 36 C.F.R. § 800.5(c). This assertion, however, misreads the governing regulations. 36 C.F.R. § 800.5(c) only requires consulting party review where HUD proposes a finding of no adverse effect on *any* historic property within the project's area of potential effects. Here, HUD made no such proposal; in fact, the agency found that there were adverse effects on certain historic properties such that it needed to consult with the ACHP and SHPO to produce an MOA. The situation simply did not meet the requirements triggering 36 C.F.R. § 800.5(c). Plaintiffs's assert that a finding under NHPA § 110f of no adverse effects on National Historic Landmarks *also* triggers § 800.5(c)'s provisions, but offer no legal support for that reading, which conflicts with the plain language of the regulation. As a result, we conclude that HUD was not in violation of the NHPA's procedural requirements in not conducting consulting party review under § 800.5(c).

B.

As noted above, NHPA § 110f imposes an affirma-

tive duty on federal agencies to minimize harm to National Historic Landmarks where it finds that a project will adversely affect such landmarks. In conducting its assessment of whether the St. Thomas project would cause such adverse effects, HUD relies on the opinion letter it received from the National Park Service. That opinion letter was drafted by Cecil McKithan, a Park Service employee, after he visited the project site for that express purpose. In it, Mr. McKithan stated that the St. Thomas project would not adversely affect the National Historic Landmarks. HUD relied on that letter in reaching its determination that the project would have no adverse effect on National Historic Landmarks in the area.

By October 2002, the State Historical Preservation Officer, the Advisory Council on Historic Preservation, and other consulting parties had expressed their objection to that determination. At that point, National Park Service contacted HUD at that point to let the agency know that it was reexamining its conclusion in response to those concerns. Mr. McKithan had by then retired, and the Park Service was reviewing his findings out of concern that it lacked sufficient information to support his determination. On December 16, 2002, however, the National Park Service withdrew its request for more time to assess the project's impact, on the grounds that it had reexamined the materials before it. In doing so, the National Park Service stated that "HUD, in accordance with 36 C.F.R. § 800.10(c), appropriately sought National Park Service's comments and relied on those comments in good faith[.]" It did not withdraw its statement that the project would have no adverse effect. By February 2003, both the SHPO and the ACHP, the very parties who had initially questioned HUD's determination of no adverse effect with regard to NHLs, had again signed onto the MOA, indicating their agreement with that determination. *See* 36 C.F.R. § § 110f(a) (noting that the results of the § 110f review process are to be incorporated into the NHPA § 106 process), 800.6(c) (a signed MOA evidences the agency's

official compliance with NHPA § 106).

Plaintiffs challenge HUD's conclusion that the project will have no significant impact on National Historic Landmarks, arguing that HUD was arbitrary and capricious in relying on the NPS's recommendation since it knew that the Park Service's recommendation was unsupported and incorrect. Essentially, they argue that the National Park Service's request for additional time to reconsider its determination renders HUD arbitrary and capricious for relying on the National Park Service's finding of no adverse impact. HUD may rely on the reasonable opinions of its own experts, however, and despite the reexamination, the National Park Service did not, as plaintiffs allege, withdraw its determination of no adverse effects. *See Marsh,* 490 U.S. at 378, 109 S.Ct. 1851 (1989). Indeed, despite the significant consideration given to outside concerns, the National Park Service refused to rescind its decision. Without some further evidence pointing to flaws in the National Park Service's decision-making process and conclusion, HUD was not arbitrary and capricious in relying on the National Park Service's determination as support for its conclusion that the project would have no significant impact in this regard.

IV.

In addition to contesting HUD's decisions based on it EA/FONSI and MOA, plaintiffs also challenge the district court's disposition of various motions. They first appeal from the district court's findings of ripeness and mootness with regard their challenges of the earlier versions of the environmental assessment/FONSI and MOA.

A.

Plaintiffs filed suit in July 2002, seeking declaratory judgment that HUD and The Housing Authority of New Orleans failed to comply with NHPA and NEPA and an injunction forcing HUD to withhold grant funds until The Housing

Authority of New Orleans became compliant. In October 2002, plaintiffs filed a motion for partial summary judgment and permanent injunction. On February 21, 2003, the district court granted HUD's motion for summary judgment, concluding in part that plaintiff's claims were not yet ripe for review because the court was "under the impression that the NEPA review was still pending." HUD had, in fact, closed the re-opened review on February 20, 2003, having again undertaken an environmental assessment and reached a FONSI; HUD, The Housing Authority of New Orleans, the SHPO, and ACHP entered an amended MOA on February 1, 2003.

Plaintiffs challenge the district court's disposition on summary judgment of their challenges to the first environmental assessment/FONSI and MOA completed for the St. Thomas redevelopment project, before those processes were reopened by HUD. A grant of summary judgment is reviewed *de novo,* "applying the same standard on appeal that is applied by the district court." *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.,* 310 F.3d 870, 877 (5th Cir.2002) (citing *Auguster v. Vermilion Parish School Board,* 249 F.3d 400, 401 (5th Cir.2001)).

In deciding whether a matter is ripe for review, the court must consider "both the fitness of the issue for the judicial determination and the hardship to the parties of withholding consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). In making its determination, the court should evaluate three factors: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 733, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998).

The district court here determined that while the complaint clearly met the case or controversy requirement of Article III, "judicial review at [that] time [was] inappropriate in light of the reopened reviews [,]" particularly since "[t]he ordinary remedy for unsustainable agency findings under NEPA is to remand the matter to the agency 'for further consideration.' " Accordingly, it held that at that time the claim would have inappropriately interfered with agency action, *viz.*, the reopened NEPA and NHPA review processes. In considering the other two *Ohio Forestry* factors, it found that plaintiffs had "failed to demonstrate any hardship" would be suffered as a result of withholding review. Plaintiffs' motion to the district court alleged that "infrastructure work is being [per]formed, which is eliminating the possibility of real consideration of alternatives to the present project," and that "[d]elay of review will harm plaintiffs['] ability to receive a true review of the Project's impact on the human environment and historic properties." A review of the record, however, indicates that the district court was given no further explanation or support for the statements beyond the allegations. Finally, the district court rightly noted that review at that time would entail judicial review of "an admittedly incomplete administrative record," as the processes in question had been reopened.

Given all of the above, the district court did not err in determining that the issue was not yet ripe for review: plaintiffs clearly had not made the showing necessary under the *Ohio Forestry* test, and their arguments fail before our court now for the same reasons.

B.

On March 31, 2003, plaintiffs amended their complaint to include the original environmental assessment/FONSI and MOA as well as the environmental assessment/FONSI and the MOA resulting from the reopened process. Plaintiffs then filed a second motion for summary

judgment and for a permanent injunction on April 4, 2003, again alleging noncompliance with NEPA and the NHPA, and seeking to stop all work on the project until an environmental impact statement and Section 106 review had been properly completed. That same day, HUD, The Housing Authority of New Orleans, and HRI all filed motions for summary judgment on the grounds that the reopened review complied with NEPA and NHPA. On April 11, 2003, the court entered an order in the case denying the plaintiffs' motion and granting HUD's motion in part. In that order, the court dismissed all of plaintiffs' claims arising under the NHPA. The court left open issues related to the first environmental assessment and FONSI insofar as they were necessary to determine awards of attorneys' fees, but stated that "the relief for remedying a deficiency in the original environmental assessment/FONSI deficient [*sic*] is now moot."

In March 2004, the court dismissed all of plaintiffs' remaining claims. In doing so, it held that the claims against the original MOA were moot, as they had been previously dismissed and were subject to the "law of the case" doctrine. In addition, the court held that challenges to the original environmental assessment/FONSI were moot and did not fall within the "capable of repetition, yet evading review" exception.

Plaintiffs first argue that the claims against the original MOA are not made moot by the law of the case doctrine because the later MOA does not encompass the entire project. The law of the case doctrine "expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messinger v. Anderson,* 225 U.S. 436, 443, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). The doctrine applies not only to issues decided explicitly, but also to everything decided "by necessary implication." *Browning v. Navarro,* 887 F.2d 553, 556 (5th Cir.1989). We reject this argument for the reasons discussed *supra;* the second, final

MOA is a comprehensive document and supercedes the original.

Corrective action by an agency can moot an issue. *See, e.g., Commissioner v. Shapiro,* 424 U.S. 614, 622-23 n. 7, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976) (holding that proper service of new notice of deficiency and new notices of levy moots question as to whether prior actions were procedurally defective). Other circuits have found that subsequent agency action under NEPA moots a challenge to original compliance where there is no relief that would "undo" the harm. *See Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin.,* 175 F.3d 1156, 1163 (9th Cir.1999) ("The ... complaints are stale because a final environmental impact statement was prepared and we can grant no relief that would 'undo' the operation of the [noncompliant agency action] during the period between issuance of the 1995 ROD and the final environmental impact statement."); *see also* Wright & Miller, Federal Practice and Procedure, § 3533.7 ("At any rate, self-correction again provides a secure foundation for mootness so long as it seems genuine."); *id.* § 3533.2 ("Action by the defendant that simply accords all the relief demanded by the plaintiff may have the same effect as settlement. So long as nothing further would be ordered by the court, there is no point in proceeding to decide the merits .... [M]ootness arises from the fact that in one way or another, the parties have acted voluntarily to dispose of the plaintiff's original claim for relief.")

In reopening the NHPA process, HUD took the voluntary action required to address plaintiffs' original claims. At the closure of that process, a second, final MOA was produced. As the St. Thomas project is no longer proceeding under the original version of the MOA, any remaining challenges to its validity have been mooted. The district court rightly disposed of claims against the final MOA in its April 13, 2003 ruling and, in its March 2004 ruling, explicitly rec-

ognizes the implicit results of that decision.

Plaintiffs next argue that the district court erred in refusing to apply the "capable of repetition, yet evading review" exception to their challenges against the original environmental assessment/FONSI. This exception to the mootness doctrine applies where (1) the challenged action is too short to be fully litigated before it ceases and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Benavides,* 238 F.3d at 671 (quoting *Spencer v. Kemna,* 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998)). Plaintiffs do not argue the second requirement at all. As to the first, they argue that HUD is likely to avoid review on other proposals, plans, or actions by using the tactic of reopening NEPA or NHPA review. It is not, however, inappropriate to permit agency reconsideration to moot an initially unripe claim where the behavior involved no longer plays a causal role in the harm alleged. *See Ohio Forestry Ass'n, Inc.,* 523 U.S. at 734, 118 S.Ct. 1665. Here, HUD took corrective action when it reopened its NEPA review processes, which, despite its reconsideration, still yielded a FONSI; plaintiffs have not demonstrated that the original FONSI still plays a causal role in the various harms they assert under NEPA. Accordingly, the later challenges to the original environmental assessment/FONSI and MOA were correctly denied as moot.

V.

Plaintiffs next challenge the district court's April 11, 2003 rulings on their Rule 59 motion regarding (1) the completeness of the administrative record, (2) the prejudicial effect of the expedited briefing schedule, and (3) the application of an incorrect standard of review.

Rulings on Rule 59(e) motions are reviewed for abuse of discretion. *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir.1990). Unless the district court clearly abused

its discretion in determining that plaintiffs' motion neither established a manifest error of law or fact nor presented newly discovered evidence, the district court's ruling should not be disturbed. *Id.*

A.

Plaintiffs attempt to introduce several pieces of extra-record evidence in arguing that HUD was arbitrary and capricious in issuing a FONSI. In their Rule 59(e) motion, they argued that the administrative record was created impermissibly in response to litigation and does not contain certain documents that should be part of the record. Among these documents are Mr. Bagert's highly critical study of the HOPE IV program and the St. Thomas project in particular, a lead contamination study referred to by Dr. Mielke in his comments to the environmental assessment regarding lead contamination, and a Citywide Testing noise survey from April 20, 2000, which found high levels of noise.

The district court refused to grant reconsideration on the issue on the grounds that plaintiffs had failed to show that any of the documents in the record were created *post hoc* or not relied on by HUD in its decision-making. It further noted that plaintiffs' argument regarding the completeness of the record was "essentially a new vehicle for asserting the same arguments they made in opposition to summary judgment--*i.e.*, that HUD failed to adequately consider certain potential environmental impacts and ignored contrary information regarding these impacts."

Extra-record evidence may be admitted if necessary to determine whether an agency has adequately considered adverse environmental impacts. *Sierra Club v. Peterson*, 185 F.3d 349, 369-70 (5th Cir.1999); *Sabine River*, 951 F.2d at 678. A district court's decision regarding the admissibility of extra-record evidence is reviewed for abuse of discretion. *Davis Mountains Trans-Pecos Heritage Ass'n v. Federal*

Aviation Admin., 116 Fed.Appx. 3, 16 (5th Cir.2004) (citing *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir.1998)) and referencing *Davidson Oil Country Supply Co. Inc. v. Klockner, Inc.*, 908 F.2d 1238, 1245 (5th Cir.1990) ("stating that '[t]he trial court's discretion to admit or exclude evidence is generally broad' ").

As our analysis *supra* records, HUD fulfilled its duty under NEPA: it identified the issue, assessed it, and reached a supported conclusion, and we find no error in the district court's grant of the motion for summary judgment. While plaintiffs may disagree with the outcome, HUD's environmental assessment did consider the issues raised, and included at least some of the information evidence plaintiffs urge was completely ignored, as has been discussed *supra*. We agree with the district court's assessment that the administrative record adequately supported HUD's FONSI, and similarly hold that the district court did not abuse its discretion in denying plaintiffs' Rule 59 motion in this respect. *See Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

B.

Plaintiffs second challenge to the district court's denial of their Rule 59(e) motion alleges that they were prejudiced by the expedited briefing schedule, which was created as a result of HUD's misstatements regarding important deadlines.

On March 20, 2003, the district judge held a status conference, at which it set an expedited schedule for reviewing the newly issued environmental assessment/FONSI and MOA based on the fact that the closing on the Wal-Mart site was scheduled for April 15. The district judge notes that plaintiffs "consented to an expedited schedule and even took part in negotiating the details of that schedule." HUD filed the Administrative Record on March 27, 2003; cross motions

for summary judgment were filed April 4, 2003. Oppositions were filed on April 8, and oral argument held on April 10.

In an April 3 phone conference, plaintiffs requested an additional court day (from Friday to Monday) in which to review the record; the district court denied the request. The scheduled closing was delayed, finally occurring in October 2003, due to the pendency of a state-court bond validation lawsuit in which plaintiffs were also participants.

The district court did not abuse its discretion in denying the motion on this ground: all parties were subject to the same time constraints, plaintiffs helped develop and agreed to the expedited schedule, and further, the closing was delayed due to a lawsuit in which plaintiffs were also participating.

C.

Plaintiffs urge that the district court should have applied a more stringent standard of review to the NEPA process based on the fact that HUD's administrative record amounts to *post hoc* rationalization of its decision to issue a FONSI. As a basis, plaintiffs cite to the fact that certain studies were completed after the environmental assessment process was reopened. Nothing in the record, however, suggests that the information HUD provided was completed to provide *post hoc* justification for the agency's final environmental assessment/FONSI. Rather, the documents appear to be those relied on by HUD in reaching its determination after reopening the process. Furthermore, the reopened process led to changes in the project--notably, the imposition of additional traffic control measures. Since plaintiffs have not sufficiently demonstrated *post hoc* rationalization or prejudgment, the district court applied the proper standard of review; *viz.*, "arbitrary and capricious."

VI.

On December 18, 2002, the district court granted plaintiffs' Rule 41(a)(2) motion to dismiss The Housing Authority of New Orleans from the case, conditioned on payment of The Housing Authority of New Orleans's attorneys' fees and costs. In early January 2003, The Housing Authority of New Orleans re-entered the case as an intervenor, to protect interests threatened by plaintiffs' request for an injunction. In March 2003, the district court awarded The Housing Authority of New Orleans $1,800.50 in attorneys' fees, covering those tasks related to the original suit and not useful to The Housing Authority of New Orleans in its role as intervenor. Plaintiffs' final issue on appeal challenges that award.

Rule 41(a)(2) motions for voluntary dismissal are not usually appealable, since it is presumed that plaintiffs obtained that which they sought.[10] *Yoffe v. Keller Indus., Inc.*, 580 F.2d 126, 129 (5th Cir.1978); *see also, Briseno v. Ashcroft*, 291 F.3d 377, 379 (5th Cir.2002); *Mortgage Guar. Ins. Corp. v. Richard Carlyon Co.*, 904 F.2d 298, 300 (5th Cir.1990). Under that rule, district courts have authority to attach conditions to such a dismissal in order to alleviate prejudice to the defendants, but such conditions should be tailored so that they only "alleviate the harm caused to the defendant." *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604-05 (5th Cir.1976). "[The Fifth Circuit has] left open the possibility that a rule 41(a)(2) dismissal with conditions imposed by the district court may constitute legal prejudice and thus render the dismissal appealable." *Briseno*, 291 F.3d at 379 (citing *Yoffe*, 580 F.2d at 129-30). We review conditions placed on a Rule 41(a)(2) motion for voluntary dis-

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[10] Defendants assert that plaintiffs may not appeal the question of attorneys' fees because they were not brought before this court with a timely notice of appeal. Because plaintiffs are not entitled to attorneys' fees even assuming, *arguendo*, that they have timely appealed the issue, we decline to decide the question here.

missal for abuse of discretion. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir.1976).

Appeal may be granted where 1) plaintiff is "legally prejudiced" by the attendant conditions and 2) has not "agreed to or legally acquiesced in those conditions." *Mortgage Guar.*, 904 F.2d at 300 (citing *Yoffe*, 580 F.2d at 130). Legal prejudice arises only where the district court's conditions are " 'clearly unreasonable' or 'so outrageous as to demand a full appellate review.' " *Yoffe*, 580 F.2d at 131; *see also, Mortgage Guar.*, 904 F.2d at 301. Awards of attorneys' fees do not generally reach that level. *See, e.g., Yoffe*, 580 F.2d at 130-31; *Mortgage Guar.*, 904 F.2d at 300- 01 (*Yoffe* precedent makes arguments that such awards cause legal prejudice "difficult to sustain").

Plaintiffs challenge the rationale given for the district court's conditions, arguing that they named The Housing Authority of New Orleans as a defendant because their arguments, in part, challenged an MOA to which the federal defendant, HUD, was not a signatory. The district court, however, correctly noted that plaintiffs' counsel should have been familiar with the fact that the APA "does not provide private plaintiffs a route for reviewing the actions of nonfederal defendants such as [The Housing Authority of New Orleans]." The court notes that plaintiffs' attorneys were also counsel in two other NEPA/NHPA suits where that principle was clearly stated: *Vieux Carre Property Owners, Residents & Assoc., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir.1989) and *Hayne Blvd. Camps Preservation Ass'n, Inc. v. Julich*, 143 F.Supp.2d 628, 631-32 (E.D.La.2001). Fees were awarded to The Housing Authority of New Orleans in the amount of $1,800.50, calculated to cover only those activities The Housing Authority of New Orleans undertook as a defendant, not those occurring after it became an intervenor.

On those facts, the district court's condition did not

create legal prejudice for the plaintiffs: plaintiffs brought suit against both HUD and the Housing Authority of New Orleans, the APA contains no provision that at any time would have given plaintiffs a private cause of action against the Housing Authority of New Orleans, and from past experience, plaintiffs' attorneys should have known that to be the case. Furthermore, the fees awarded were closely tied to the time and effort the Housing Authority of New Orleans had expended in defending itself against those claims. Accordingly, the District Court's award of attorney's fees is not an abuse of discretion.

VII.

For these reasons, we conclude that HUD's decision that an EIS was not required was not arbitrary, capricious, or contrary to law; that no further action is required of the agency at this time under NEPA or the NHLA; and that the district court committed no reversible error in its decisions or its handling of the case. Accordingly, HUD's decision and the judgment of the district court are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 02-2207 Section "N"

COLISEUM SQUARE ASSOCIATION, INC., *et al.*,,
Plaintiffs

v.

SECRETARY MEL MARTINEZ, et al.,
Defendants

March 17, 2004, Decided
March 17, 2004, Filed; March 18, 2004, Entered

ORDER AND REASONS

Before the Court are the following motions: (1) Federal Defendant HUD's Motion to Dismiss, and (2) Plaintiffs' Motion for Summary Judgment. For the reasons that follow, HUD's motion to dismiss is GRANTED. The motion filed by plaintiffs is therefore DISMISSED as moot.

I. BACKGROUND

In 1996, the Housing Authority of New Orleans ("HANO") applied to the United States Department of Housing and Urban Development ("HUD") for a grant to revitalize the St. Thomas Housing Development, a decaying 1,510-unit public housing property in New Orleans. HUD agreed to provide a $ 25 million grant through its HOPE VI program. In addition to obtaining the HUD grant, HANO has brought together state, local, and private funding for the revitalization project (the "Project").

In September 2000, HUD completed an initial review of the Project's impact on historical properties, as required under the *National Historic Preservation Act* ("NHPA"). This review resulted in a Memorandum of Agreement ("MOA") among HANO, the State Historical Preservation Officer ("SHPO"), and the Advisory Council on Historic Preservation ("ACHP"). HUD then reopened the NHPA review in November 2001, after it was announced that a Wal-Mart Superstore would occupy a retail space in the Project. An amended MOA was entered into among HUD, HANO, the SHPO, and ACHP, with the last signatory signing on February 1, 2003. (AR 2617-2636).

In July 2002, the plaintiffs (a group of non-profit organizations, including a local merchant's association and a neighborhood association) filed this suit. The original complaint sought: (1) a declaratory judgment finding that HUD and HANO failed to comply with the NHPA and the *National Environmental Protection Act* ("NEPA"); and (2) an injunction compelling HUD to withhold all HOPE VI funds from HANO until HANO is determined to be in compliance with NEPA and the NHPA. *See* Compl. at PP108-09.

Subsequent to plaintiffs' filing suit, HUD reopened its NEPA review, which previously had resulted in an environmental assessment ("EA") and finding of no significant impact ("FONSI"). While the reopened NHPA and NEPA reviews were still pending, plaintiffs filed a motion for partial summary judgment and permanent injunction. This Court denied the motion on February 27, 2003, finding the plaintiffs' claims to be unripe. (Rec.Doc. 93).

HUD completed its NEPA review on February 20, 2003, (n1) with a final EA and FONSI. (AR 01-13). Upon learning of the new EA and FONSI, plaintiffs filed a motion for temporary restraining order, seeking to prevent the transfer of the Wal-Mart property site to the developer (HRI). (n2) (Rec.Doc. 95). The Court held a status conference, at

which HANO informed the Court that the transfer was scheduled to take place on April 15, 2003. The Court denied the motion for temporary restraining order and set an expedited schedule for production of the administrative record and motion practice. (Rec.Doc. 102).

> (n1) Although HUD had a pending motion before this Court seeking to dismiss plaintiffs' claims as unripe (due to the ongoing reviews), HUD did not inform the Court when it issued the new EA and FONSI. Thus, when the Court issued its ruling on February 27, 2003, staying plaintiffs' claims as unripe, the Court was under the misimpression that the NEPA review was still pending.

> (n2) During the pendency of NEPA and NHPA reviews, HUD had prohibited HANO from transferring title to the property to the developer (HRI), thereby restricting work on the Project to: (1) infrastructure work on the residential portion of the Project; and (2) environmental remediation.

Pursuant to that expedited schedule, HANO filed a Motion for Summary Judgment, seeking dismissal of plaintiffs' Complaint on the grounds that HUD's review of the Project complied with NEPA and NHPA, and that plaintiffs lacked standing. Federal Defendant HUD and intervenor HRI likewise filed their own Motions for Summary Judgment, seeking dismissal of the Complaint based on compliance with NEPA and with NHPA Plaintiffs, in turn, moved for summary judgment, granting the relief requested in their Complaint, and for a permanent injunction stopping all work on the Project until such time as an EIS was completed under NEPA and the Section 106 review was completed under

NHPA. Oral argument was set for and held on April 10, 2003.

After the motions were filed and before the Court ruled, plaintiffs filed a Second Supplemental and Amending Complaint, which largely reiterated the claims originally made, simply having added the new EA and FONSI and the amended MOA to the original agency findings. (Rec.Doc. 109).

The Court ruled on the motions on April 11, 2003. The Court denied the plaintiffs' Motion for Summary Judgment and Permanent Injunction. In ruling on HUD's Cross Motion for Summary Judgment, the Court granted the Motion in part, dismissing plaintiffs' claims under NHPA and plaintiffs' claims under NEPA insofar as they related to the February 20, 2003 EA/FONSI, and denied the Motion in part, on the issue of mootness. n3 The Court thereafter denied as moot the Motions for Summary Judgment filed by HANO and by HRI.

(n3) In denying HUD's Motion in part, the Court found that genuine issues did exist concerning the plaintiffs' potential recovery of attorneys' fees as a "prevailing party" and the application of the "catalyst theory" to the facts. *See* Rec.Doc. 127 at p. 10 (the Court is "unconvinced... that HUD is entitled to judgment as a matter of law dismissing plaintiffs' claim for attorneys' fees as it relates to the original EA/FONSI"). At the time the Court rendered Judgment, however, the Court did not have before it any arguments advanced by defendants regarding the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001)*. In *Buckhannon,* the Supreme

Court explicitly rejected the catalyst theory as a basis for the recovery of attorneys' fees as a "prevailing party" under the Fair Housing Amendments Act ("FHAA"), *42 U.S.C. § 3601, et seq.*, and the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12101, et seq.*

II. LAW AND ANALYSIS

HUD presently asks this Court to find that "there is no case or controversy with regard to Plaintiff's challenge to the original EA/FONSI" and to issue an Order, pursuant to *Fed. R. Civ. P. 12(b)(1)*, dismissing Plaintiffs' action in its entirety. (Rec. Doc. 171 at p. 1). Plaintiffs argue that the original MOA and the original EA/FONSI were inadequate ; that a live case or controversy does exist; and that the doctrine of "capable of repetition yet evading review" precludes dismissal of plaintiffs' Complaint.

A. Standing:

This Court set forth the applicable law governing standing in its February 27, 2003 ruling, and will not reiterate it here. (Rec.Doc. 93). In that ruling, the Court held that two of the plaintiffs (Coliseum Square Association and Historic Magazine Row Association) had satisfied the requisites of representational standing at the time of their filing the Complaint(s).

B. Mootness

To sustain jurisdiction in the instant matter, it is not enough that a dispute was alive when suit was filed; instead, "an actual controversy must be extant at all stages of review." *Preiser v. Newkirk, 422 U.S. 395, 402-403, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975).* Stated otherwise, "'the requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" *Dailey v. Vought Aircraft Co., 141 F.3d 224,*

227 (5th Cir. 1998) (quoting *United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980)).* "Under [the mootness] doctrine, although a justiciable controversy may have existed at the time litigation was commenced, the action must be dismissed for want of jurisdiction if the controversy ceases to exist at some point in the litigation." *Dailey, 141 F.3d at 227.*

"A case may become moot for several reasons;" one such reason is an intervening factual event. *Id.* "A case is not moot, though, only because a defendant voluntarily ceases the allegedly improper behavior that is the subject of the lawsuit." *Christian Coalition of Ala. v. Cole, 355 F.3d 1288, 2004 WL 34832 *2 (11th Cir.). See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 189, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000).* "Only when the defendant can demonstrate there is no reasonable expectation that the wrong will be repeated are federal courts precluded from deciding the case on mootness grounds." *Christian Coalition, 355 F.3d 1288, 2004 WL 34832 *2* (internal quotations omitted). *See also Laidlaw, 528 U.S. at 189.* The party asserting the mootness - here, HUD - has the "heavy burden of persuading" the court that the challenged conduct cannot reasonably be expected to start up again. *Laidlaw, 528 U.S. at 189.*

1. NHPA

In the April 11, 2003 decision, the Court granted summary judgment in favor of HUD with regard to plaintiffs' NHPA claims. (Rec.Doc. 127). The Court determined that "plaintiffs ... failed to demonstrate any genuine issue of fact and that HUD is entitled to judgment as a matter of law *dismissing plaintiffs' NHPA claims."* (Rec.Doc. 127, pp. 5-6) (emphasis added). Plaintiffs therefore have no NHPA claims remaining to adjudicate. For the Court to now reconsider plaintiffs' NHPA claims based on the original MOA would violate the "law of the case" doctrine. n4 *See Office of Thrift Supervision v. Felt (In re Felt), 255 F.3d 220, 225, cert. de-*

nied, Felt v. Office of Thrift Supervision, 534 U.S. 1078, 151 L. Ed. 2d 693, 122 S. Ct. 807 (2002).

> (n4) "Under the 'law of the case' doctrine, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." *F.D.I.C. v. McFarland, 243 F.3d 876, 884 (5th Cir. 2001)* (citations and quotations omitted). "This doctrine applies regardless of whether the issue was decided expressly or by necessary implication." *Id.*

2. NEPA

The NEPA violations, according to plaintiffs, concern alleged inadequacies and procedural defects in the original and supplemental EA/FONSI, as well as the addition of the Wal-Mart Superstore to the Project, prior to the preparation of a Supplemental EA and FONSI (or EIS, if so required). *See* Compl. at P32.

On April 11, 2003, the Court upheld the Supplemental EA/FONSI as legally sufficient. "In dismissing plaintiffs' NEPA claims insofar as they relate to the February 20, 2003 EA and FONSI" (Rec.Doc.127 at p. 9), the Court found that a review of the administrative record revealed "that HUD did evaluate the issues raised by the plaintiffs, including: potential impacts of noise, vibration, lead, drainage, and increased traffic; issues of environmental justice; potential impacts on historic properties; potential economic impact; local zoning laws; and alternatives to the Project." (Rec.Doc.127 at p. 8).

By effect of the April 11, 2003 partial dismissal, the only claims of plaintiffs that remained were those relative to the original EA/FONSI. However, in that same Order, the Court stated that "the relief for remedying a deficiency in the original EA/FONSI deficient [*sic*] is now moot." (Rec.Doc. 127 at p.10). Nevertheless, the Court denied, in part, HUD's

Motion for Summary Judgment on the issue of mootness, as the Court was "unconvinced... that HUD is entitled to judgment as a matter of law dismissing plaintiffs' claim for attorneys' fees as it relates to the original EA/FONSI." *Id.*

HUD now asserts the argument that logically follows, *i.e.,* that because the plaintiffs effectively have received the relief they sought in bringing their NEPA challenge with regard to HUD's original EA/FONSI, there no longer exists a live case or controversy, and without such a dispute, this Court no longer has jurisdiction over the matter.

In opposing HUD's motion, plaintiffs argue that Federal Defendant HUD has not met its "heavy burden of persuading the court that the challenged conduct cannot be reasonably expected to start up again." Plaintiffs also argue that the instant matter falls within the "capable of repetition, yet evading review" exception to mootness.

In their first argument - that HUD has not met its burden, the plaintiffs rely heavily on a *Clean Water Act* case, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000).* In *Laidlaw,* the Supreme Court granted certiorari to address the Fourth Circuit's decision that a citizen suit plaintiff's claim for civil penalties must be dismissed when the defendant - after initiation of the litigation - had come into voluntary compliance with its permit. *Laidlaw,* (n5), *528 U.S. 167, 180, 145 L. Ed. 2d 610, 120 S. Ct. 693* The Court found that the Fourth Circuit had erred by conflating Supreme Court caselaw on standing and mootness, and reasserted that a defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. *Id. at 173-174.* Specifically, in its discussion of mootness, the Court noted that the case might become moot if Laidlaw's voluntary compliance with its permit or closure of the wastewater treatment facility "made it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur." *Id. at 193.* The Court remanded to allow the lower

court to consider the disputed facts of "the effect of both Laidlaw's compliance and the facility closure on the prospect of future violations...." *Id.* This remand was necessary, even in light of the asserted closure of the facility, in part because Laidlaw had retained its NPDES permit. *Id. at 194.*

> (n5) In *Laidlaw,* the district court had denied injunctive relief. The only issue, therefore, was the mootness of the civil penalties, awarded by the district court in order to deter Laidlaw from violating the *Clean Water Act. Laidlaw, 528 U.S. at 193.*

In this case, however, there is no reasonable expectation of HUD's resuming the challenged activity. This is not a case like *Laidlaw,* where the defendant retained a NPDES permit; where the court had found numerous violations of that permit; and where statutory civil penalties were available to deter future violations. Here, HUD supplemented the original EA/FONSI to review in greater detail the effect the Project, including the Wal-Mart Superstore will have on the environment. HUD's decision to move forward with the Project is based on the February 20, 2003 EA and FONSI, which this Court has determined to be procedurally adequate. While any actions taken in the time period between the Original EA/FONSI and Supplemental EA/FONSI may not be palatable to the plaintiffs, nonetheless, any such actions fall within the scope of the Supplemental EA/FONSI.

In addition, plaintiffs argue that the dispute falls within the "capable of repetition, yet evading review" exception to the mootness doctrine, and that the suit therefore remains justiciable. Plaintiffs' contention is flawed, however. Because this exception to the mootness doctrine "permits suits for prospective relief to go forward despite abatement of the underlying injury," it is found only in "exceptional

situations." *Lewis v. Continental Bank Corp., 494 U.S. 472, 481, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990)* (citing *Los Angeles v. Lyons, 461 U.S. 95, 109, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983))*. Such "exceptional situations" exist only where the following circumstances are simultaneously present: "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Lewis, 494 U.S. at 481* (quoting *Murphy v. Hunt, 455 U.S. 478, 482, 71 L. Ed. 2d 353, 102 S. Ct. 1181 (1982) (per curiam)* (quotation omitted). Neither of these requirements is satisfied here.

Plaintiffs erroneously rely on *Super Tire Engineering Company v. McCorkle, 416 U.S. 115, 125, 40 L. Ed. 2d 1, 94 S. Ct. 1694 (1974)* to support their position that the requested declaratory relief pertaining on the original EA/FONSI falls within the exception and is not moot. In *Super Tire,* the petitioner employer was engaged in cyclically recurring bargaining with the union representing its employees, and the respondent state official was continuously following a policy of paying unemployment compensation benefits to strikers. Even though the particular strike which had been the occasion for the filing of the lawsuit was terminated, the Court held that it was enough that the petitioner employer showed "the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." *416 U.S. at 125-26.* The Court further noted that "the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender." *Id. at 126. See accord Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)* and *Doe v. Bolton, 410 U.S. 179, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973)* (the pregnant appellants had long since outlasted their pregnancies by the time their cases reached the Supreme

Court, yet the Court had no difficulty rejecting suggestions of mootness); *Storer v. Brown, 415 U.S. 724, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974)* and *Rosario v. Rockefeller, 410 U.S. 752, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973)* (cases concerning various challenges to state election laws).

By attaching the affidavits of John Wettermark and Elizabeth Marshal Stout, plaintiffs seek to illustrate to this Court that the defendants plan other additions (n6) to the project which were not subject to the NEPA review process. Hence, plaintiffs claim entitlement to declaratory relief even in the current posture of this case because defendants are allegedly failing to comply with those legal requirements. Plaintiffs therefore urge that indeed defendants' conduct falls within the scope of the "capable of repetition" exception in that defendants are shirking their responsibilities under NEPA with regard to the new aspects described in the Wettermark and Stout affidavits. This, however, is an extraordinarily broad reading of the "capable of repetition, yet evading review" exception to the mootness doctrine.

(n6) The alleged proposal added 50,000 to 60,000 square feet of additional retail space and a 30,000 square foot YMCA facility.

First of all, were defendants to choose a project significantly different from that subject to the February 20, 2003 review, by definition this would not be a "repetition" of the prior plan. (n7) The specific project which was the subject of the February 20, 2003 review has been and will henceforth be subject to the February 20, 2003 NEPA review, which this Court has found to be legally sufficient. A "new" project would, perhaps, raise questions as to compliance with NEPA, to the extent those laws are applicable to the new plan, but surely would not be a "repetition" of commencement of the existing project.

(n7) *Cf. Vieux Carre Property Owners, Residents and Assocs. v. Brown, 948 F.2d 1436, 1447-48 (5th Cir. 1991)* (finding that plaintiffs met repetition prong of "capable of repetition, yet evading review" exception, as the "expectation of future development of the riverfront park on other wharfs of the MS River in the historic district makes the alleged harm to [plaintiffs] capable of repetition."). Unlike the case sub judice, *Vieux Carre* involved the "unique situation where the *absence of review* by the appropriate government agency made uncertain the mooting affect of substantially completed construction." *Benavides v. Housing Auth. of City of San Antonio, 238 F.3d 667, 670 (5th Cir. 2001)* (emphasis added). *Cf. also Missouri Coalition for the Env't. v. Corps of Eng'rs of the U.S. Army, 866 F.2d 1025, 1029-30 (8th Cir. 1989), cert. denied, 493 U.S. 820, 107 L. Ed. 2d 42, 110 S. Ct. 76 (1989),* a case dissimilar factually and procedurally from the case subjudice.

Unlike the entity allegedly contaminating water in *Laidlaw,* or the state's alleged use of public funds to benefit striking workers in *Super Tire Engineedring Company,* HUD and HANO logically cannot again create the same project which was the subject of the February 20, 2003 NEPA review, and now embark upon it without complying with NEPA. Quite simply, plaintiffs' complaint about other plans or portions of projects, or proposed additions to the existing project, are not "repetitions", but rather raise new issues not part of the project as it existed on February 20, 2003, not presently before the Court, and thus not a repetition of conduct placed at issue before the Court as part of this litigation. The potential, or even anticipated, future violation of the same laws by the defendants in other respects does not, in

itself, invoke the "capable of repetition, yet evading review" exception.

As a further note, the Court finds that the failure to supplement an EA is not the sort of action which, by reason of the inherently short duration of the opportunity for remedy, is likely forever to evade review. *Cf., Alaska Fish & Wildlife Fed'n v. Dunkle, 829 F.2d 933, 939 (9th Cir. 1987), cert. denied, 485 U.S. 988, 99 L. Ed. 2d 501, 108 S. Ct. 1290 (1988)* (action not moot as "regulation challenged was in effect for less than one year, making it difficult to obtain effective judicial review."). If plaintiffs deem that a change in the Project is major and requires the preparation of a supplemental EA, there will be ample time to obtain judicial review of the assessment.

Because the Court today finds that plaintiffs' remaining NEPA claims, if any, have been rendered moot and do not fall within any exception to the mootness doctrine, there is no longer a dispute, or live case or controversy, for the Court to decide. Without a live case or controversy, the limitation on this Court's Article III powers is invoked. Therefore, Federal Defendant HUD is entitled to judgment as a matter of law, dismissing plaintiffs' Complaint, insofar as it relates to the NEPA claims.

3. Attorneys' Fees

The Court has acknowledged that there also remains the issue of whether plaintiffs are entitled to recover attorneys' fees under the Equal Access to Justice Act, *28 U.S.C. § 2412, et seq.* ("EAJA"), for prompting HUD to reopen its NEPA review. (Rec.Doc. 127 at p. 10). Plaintiffs' EAJA claim, however, cannot serve as the basis to create a live case or controversy with regard to HUD's original EA/FONSI. *See generally Lewis v. Continental Bank Corp., 494 U.S. 472, 481, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990)* (an "in-

terest in attorney's fees is... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." (citation omitted)). Rather, any claim for attorneys' fees is collateral to plaintiffs' underlying merits claim. *See FCC v. League of Women Voters, 468 U.S. 364, 373-74, n. 10, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984)*; *Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202-203, 100 L. Ed. 2d 178, 108 S. Ct. 1717 (1988)*. Because the Court today is dismissing all of plaintiffs' underlying claims, plaintiffs' entitlement to attorneys' fees, if any, will not preclude a finding of mootness in the instant matter.

While plaintiffs have not filed a motion for attorneys' fees, the Court finds it necessary to address arguments advanced by defendants which suggest that current caselaw precludes any award of attorneys' fees in the instant matter.

The Court agrees with the defendants in that the only theory under which plaintiffs could potentially argue that they are a "prevailing party" (n8) for the purpose of recovering attorneys' fees would be the "catalyst theory," which provides that a plaintiff is a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. *See generally Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001)*. However, the Supreme Court in *Buckhannon* explicitly rejected the catalyst theory. *See id. at 605*. Specifically, the Court held:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents... counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

Id. Although petitioners in *Buckhannon* requested attorneys' fees as the "prevailing party" under the Fair Housing Amendments Act ("FHAA"), *42 U.S.C. § 3601, et seq.*, and the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12101, et seq.*, the *Buckhannon* holding applies with equal force to cases in which attorneys' fees are sought under NEPA through the Equal Access to Justice Act ("EAJA"), *28 U.S.C. § 2412, et seq. See, e.g., N.C. Alliance for Transp. Reform, Inc. v. United States DOT, 151 F. Supp. 2d 661, 673 n.11 (M.D.N.C. 2001).*

> (n8) *Title 28 of the United States Code, Section 2412* provides, in pertinent part, that a "court may award reasonable fees and expenses of attorneys ... to the *prevailing party* in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity...." (Emphasis added).

While HUD did re-open its review process subsequent to plaintiffs' filing suit, there is no action taken by this Court whereby plaintiffs could be considered a "prevailing party" for purposes of the EAJA. n9 Therefore, in light of this Court's dismissal of the Complaint in its entirety and in accordance with the *Buckhannon* decision, no basis exists for plaintiffs to seek attorneys' fees in this matter.

> (n9) Notably, plaintiffs have admitted that, under *Buckhannon*, a ruling "in HUD's favor on the Motion to Dismiss... would preclude any attorney fees application by plaintiffs." (Rec.Doc. 178 at p. 1).

III. CONCLUSION

Accordingly, for the foregoing reasons, **IT IS ORDERED** that:

(1) Federal Defendant's (HUD's) Motion to Dismiss is **GRANTED,** dismissing plaintiffs' claims; and

(2) Plaintiffs' Motion for Summary Judgment is **DISMISSED** as moot.

New Orleans, Louisiana, this 17th day of March 2004.

KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 02-2207 Section "N"

COLISEUM SQUARE ASSOCIATION, INC., *et al.*,,
Plaintiffs

v.

SECRETARY MEL MARTINEZ, et al.,
Defendants

Entered and Filed on April 11, 2003

ORDER AND REASONS

Before the Court are the following motions: (1) Plaintiffs' Motion for Summary Judgment and Permanent Injunction; (2) Federal Defendant's (HUD's) Cross Motion for Summary Judgment; (3) HANO's Motion for Summary Judgment; and (4) a Cross Motion for Summary Judgment by intervenor, Historic Restoration, Incorporated (HRI). For the reasons that follow, plaintiff's motion is DENIED, and HUD's motion for summary judgment is GRANTED in part and DENIED in part. The motions filed by HANO and HRI[11] are therefore moot.

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[11] HANO and HRI appear before the Court in the posture of intervenors pursuant to Fed.R.Civ.P. 24. Their interests are aligned with those of defendant HUD. Plaintiffs assert no claim against these parties.

I. BACKGROUND

In 1996, the Housing Authority of New Orleans ("HANO") applied to the United States Department of Housing and Urban Development ("HUD") for a grant to revitalize the St. Thomas Housing Development, a decaying 1,5 10-unit public housing property in New Orleans. HUD agreed to provide a $25 million grant through its HOPE VI program. In addition to obtaining the HUD grant, HANO has brought together state, local, and private funding for the revitalization project (the "Project").

In September 2000, HUD completed an initial review of the Project's impact on historical properties, as required under the National Historic Preservation Act ("NHPA"). This review resulted in a Memorandum of Agreement ("MOA) among HANO, the State Historical Preservation Officer ("SHPO"), and the Advisory Council on Historic Preservation ("ACHP"). HUD then reopened the NHPA review in November 2001, after it was announced that a Wal-Mart Superstore would occupy a retail space in the Project. An amended MOA was entered into among HUD, HANO, the SHPO, and ACHP, with the last signatory signing on February 1, 2003. (AR 26 17-2636).

On July 19, 2002, the plaintiffs (a group of non-profit organizations, including a local merchant's association and a neighborhood association) filed this suit. The original complaint sought: (1) a declaratory judgment finding that HUD and HANO have failed to comply with the NHPA and the National Environmental Protection Act ("NEPA"); and (2) an injunction compelling HUD to withhold all HOPE VI funds from HANO until HANO is determined to be in compliance with NEPA and the NHPA. See Compl. at ¶¶ 108-09.

Subsequent to plaintiffs' filing suit, HUD reopened its NEPA review, which previously had resulted in an environ-

mental assessment ("EA") and finding of no significant impact ("FONSI"). While the reopened NHPA and NEPA reviews were still pending, plaintiffs filed a motion for partial summary judgment and permanent injunction. This Court denied the motion on February 27, 2003, finding the plaintiffs' claims to be unripe. (Rec.Doc. 93).

HUD completed its re-opened NEPA review on February 20, 2003,[12] with a final EA and FONSI. (AR 01-13). Upon learning of the new EA and FONSI, plaintiffs filed a motion for temporary restraining order, seeking to prevent the transfer of the Wal-Mart property site to the developer (HRI).[13] (Rec.Doc.95). The Court held a status conference, at which HANO informed the Court that the transfer is scheduled to take place on April 15, 2003. The Court denied the motion for temporary restraining order and set an expedited schedule for production of the administrative record and motion practice. (Rec.Doc. 102). The instant motions were filed pursuant to this expedited schedule.

Plaintiffs have filed a Second Supplemental and Amending Complaint, which largely reiterates the claims originally made, simply adding the new EA and FONSI and the amended MOA to the original agency findings. (Rec.Doc. 109).

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[12] Although HUD had a pending motion before this Court seeking to dismiss plaintiffs' claims as unripe (due to the ongoing reviews), HUD did not inform the Court when it issued the new EA and FONSI. Thus, when the Court issued its ruling on February 27, 2003, staying plaintiffs' claims as unripe, the Court was under the misimpression that the NEPA review was still pending.

[13] During the pendency of NEPA and NHPA reviews, HUD had prohibited HANO from transferring title to the property to the developer (HRI), thereby restricting work on the Project to: (1) infrastructure work on the residential portion of the Project; and (2) environmental remediation.

II. LAW AND ANALYSIS

Plaintiffs ask the Court to "issue a Permanent Injunction which stops all work on the project until such time as an EIS [Environmental Impact Statement] is complete under NEPA and the Section 106 review is complete under NHPA." See Rec. Doc. 117 at p.41. HUD argues that the MOA and its EA and FONSI are supported by the administrative record and that plaintiffs' claims should be dismissed.

A. Standing:

This Court set forth the applicable law governing standing in its February 27, 2003 ruling, and thus need not reiterate it here. (Rec.Doc. 93). In that ruling, the Court held that two of the plaintiffs (Coliseum Square Association and Historic Magazine Row Association) had satisfied the requisites of representational standing. The intervenors argue that the plaintiffs have failed to support their standing with sufficient evidence of particularized injury to survive the summary judgment motions before the Court. The Court disagrees. The record contains affidavits demonstrating that Coliseum Square Association, Inc., Smart Growth for Louisiana, Inc., Historic Magazine Row Association, and The Urban Conservancy, Inc. either have an office located in the Lower Garden District or have members who live and/or own businesses in the Lower Garden District. See Pl. Opp. Memo to Mtn. to Dismiss (Rec.Doc.76), Exh. A & D; Pl. Opp. Memo to Procedural Defenses (Rec.Doc. 123), Exh. C & D. The record contains evidence that a member of Louisiana Landmarks Society, Inc. lives on the 1400 block of Jackson Avenue. (Rec.Doc. 123, Exh. B.) The Lower Garden District has a very close geographical proximity to the Project site. Moreover, the administrative record reflects that traffic will increase on Felicity Street (which runs directly through the Lower Garden District) and Jackson Avenue. The Court finds this evidence sufficient to demonstrate a par-

ticularized, nonconjectural injury on the part of each plaintiff.

B. NHPA:

Section 106 of the National Historic Preservation Act ("NHPA") requires a federal agency to "take into account the effect of [any] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. The agency also must give the Advisory Council on Historic Preservation (the "Council") a "reasonable opportunity to comment with regard to such undertaking." *Id.* In consultation with the State Historic Preservation Officer ("SHPO") (the official responsible for representing the interests of the State and its citizens), the agency must make "a reasonable and good faith effort" to identify historic properties that may be affected by the undertaking and gather information to assess the adverse effects, if any, of the project on such properties. See 36 C.F.R. § 800.4. Where, as here, an adverse effect is found, the agency must consult further to resolve the effect by developing modifications or alternatives designed to avoid, minimize, or mitigate the adverse effects, in accordance with the procedure set out in 36 C.F.R. § 800.6. See 36 C.F.R. § 800.5(d). If the agency, the SHPO, and the Council "agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement." 36 C.F.R. § 800.6(b)(2). "A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its part." 36 C.F.R. § 800.6(c).

Here, the agency, the SHPO, and the Council did agree on how the adverse effects would be resolved and did execute an amended memorandum of agreement, as required under the implementing regulations. (AR 26 17-2636). Moreover, the administrative record is replete with evidence demonstrating the complex and public consulting process

that accompanied the section 106 review. Indeed, all but one of the plaintiffs were consulting parties to this process. They obviously are displeased with the outcome of this process. However, the MOA is adequately supported by the administrative record and demonstrates compliance with the NHPA and the regulations implementing it. The Court is unable to find HUD's decision to be arbitrary and capricious or otherwise not in accordance with law.[14] Accordingly, the Court finds that plaintiffs have failed to demonstrate any genuine issue of fact and that HUD is entitled to judgment as a matter of law dismissing plaintiffs' NHPA claims.

C. NEPA:

NEPA is a "procedural statute." *Sierra Club v. Espy*, 38 F.3d 792, 802 (5th Cir. 1994). It "does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after taking a 'hard look at environmental consequences.'" *Id.* (quoting *Sabine River Auth. v. United States Dep't of Interior*, 951 F.2d 669 (5th Cir.), cert. denied, 506 U.S. 823 (1992)). Agencies comply with NEPA by preparing an environmental assessment ("EA) of the project in question and/or an environmental impact statement ("EIS"). An EA "is prepared in order to determine whether an EIS is required." *Espy*, 38 F.3d at 802. It is "a 'rough-cut, low-budget environmental impact statement' intended to determine whether environmental effects are significant enough to warrant

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[14] Pursuant to the Administrative Procedure Act ("APA"), judicial review of an agency's decision "is usually limited to determining whether agency action is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *United States v. Bean*, 123 S. Ct. 584,587-88 (2002) (quoting 5 U.S.C. § 706(2)(A)). Plaintiffs' brief can be read to argue that the AF'A's arbitrary and capricious standard does not apply in reviewing an agency's actions under the NHPA. At oral argument, however, counsel clarified that plaintiffs' statements were directly solely at the lack of discretion due to HUD in interpreting the regulations implementing the NHPA.

preparation of an EIS." *Id.* (quoting *Sabine*, 951 F.2d at 676). "The EA will come to one of two findings: either that the project requires the preparation of an EIS to detail its environmental impact, or that the project will have no significant impact (a "FONSI") necessitating no further study of the environmental consequences which would ordinarily be explored through an EIS." *Sabine*, 951 F.2d at 677. The determination of whether an environmental impact is significant entails consideration of two factors: context and intensity. 40 C.F.R. § 1508.27.

An agency's decision to forego an EIS is reviewed under the "arbitrary and capricious" standard. See *Sabine*, 951 F.2d at 677.[15] "Under this highly deferential standard of review, a reviewing court has the 'least latitude in finding grounds for reversal.'" *Id.* at 678 (quoting *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533,1538 (11th Cir. 1990)). The Court "may not substitute its judgment for that of the agency, but must studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors." *Id.* "Where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence." *Id.* "The agency may even rely on the opinions of its own experts, so long as the experts are qualified and express a reasonable opinion." *Id.* Under such circumstances, the reviewing court "must show the proper respect for an agency's reasoned conclusion

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[15] Before Sabine, the Fifth Circuit instructed courts reviewing agency decisions under NEPA to "apply the moderately deferential 'reasonableness' standard -rather than the highly deferential 'arbitrary and capricious' standard adopted by other circuits-in reviewing an agency's decision to forego an EIS." *Sabine*, 951 F.2d at 677 (citing *Fritiofson v. Alexander*, 772 F.2d 1125, 1237 (5th. Cir. 1985)). In *Sabine*, however, the Fifth Circuit concluded that its prior precedent (e.g., *Fritiofson*) has been undercut by the Supreme Court's decision in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)). Id. at 677- 78.

even if the reviewing court finds the opinions of other experts equally or more persuasive." *Id.*

Plaintiffs first argue that HUD's decision is inadequate under NEPA because HUD did not adequately consider: (1) adverse impact from traffic, noise, vibration, lead, or drainage; (2) adverse impacts on historic districts; (3) adverse economic impact; (4) issues of environmental justice; (5) alternatives to the Project; or (6) local zoning laws.

Having reviewed the administrative record, the Court is unable to find HUD's February 20, 2003 EA and FONSI arbitrary and/or capricious in any respect. Contrary to plaintiffs' assertions, the administrative record reveals that HUD did evaluate the issues raised by the plaintiffs, including: potential impacts of noise, vibration, lead, drainage, and increased traffic[16] issues of environmental justice[17]; potential impacts on historic properties[18]; potential economic impact[19]; local zoning laws[20]; and alternatives to the Project.[21] Although HUD relied on experts with whom plaintiffs disagree, and reached conclusions that conflict with the plain-

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[16] See, e.g., Study by Urban System, Inc. (AR 5941 -5958) (concluding that streets in the affected area (including Jackson Avenue and Felicity Street) are under-utilized and will continue to be under-utilized after the Project is complete); Supplemental Traffic Analysis by Urban System, Inc. (AR 6465-6472) (concluding that the impact of the Project on area intersections will not be significant); Report of Delta Testing and Inspection, Inc. (concluding that seismic readings along Jackson Avenue are within safe limits).

[17] See Report of C-K Associates, Inc. (AR 1027-1052) (finding net positive effect on the minority and low-income population).

[18] See, e.g., AR 2643-49, 2699-2713.

[19] See, e.g., AR 2647.

[20] See Ordinance (Dec. 6,2001) waiving certain zoning regulations. (AR 829-833).

[21] See, e.g., AR 1367-69.

tiffs' opinions, these are not valid grounds for vacating HUD's decision.

Plaintiffs also argue that HUD's own regulations require an EIS because the Project would "remove ... 2,500 or more existing housing units ..., or would result in the construction or installation of 2,500 or more housing units." See 24 C.F.R. § 50.42. The Court disagrees. The regulation plainly states that an EIS "normally" is required if a project would "remove ... 2,500 or more existing housing units ..., would result in the construction or installation of 2,500 or more housing units." 24 C.F.R. § 50.42 (emphasis added). The Project here calls for the removal of 1520 units and the construction of 1248 units. Both numbers fall far short of HUD's presumptive threshold. Plaintiffs argue that the number of units demolished should be added to the number of units to be constructed. The Court agrees with HUD that plaintiffs' reading is contrary to the plain language of the regulation, even when read in light of 24 C.F.R. § 50.21, as plaintiffs argue it should be.[22] Were the number of previous units added to the number of proposed units, as plaintiffs contend, the regulatory threshold would be significantly different than that clearly intended and expressed in the regulation.

Given the context of the Project, the Court does not find HUD's findings regarding the severity of potential environment impacts to be without basis in the record. Nor does the Court find HUD's decision to forego an EIS to be in any respect arbitrary, capricious, or otherwise contrary to law. Accordingly, the Court finds that plaintiffs have failed to demonstrate any genuine issues of fact and that HUD is entitled to judgment as a matter of law dismissing plaintiffs'

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[22] Section 50.21 provides: "Activities which are geographically related and are logical parts of a composite of contemplated HUD projects shall be evaluated together." 24 C.F.R. § 50.21.

NEPA claims insofar as they relate to the February 20, 2003 EA and FONSI.

D. Mootness:

Plaintiffs' amending complaints continue to assert complaints regarding the original EA and FONSI.[23] HUD argues that it would serve no purpose to litigate the efficacy of the original EA/FONSI and that plaintiffs' claims attacking it are consequently moot. The Court is unconvinced based on the briefs filed to date that matter is wholly devoid of a live, justiciable issue. It is true that the relief for remedying a deficiency in the original EA/FONSI deficient is now moot.[24] However, plaintiffs have asserted a claim for attorneys' fees which maybe justiciable despite the Court's ruling on the newly-issued EA/FONSI, particularly if it is shown that plaintiffs' initially-filed lawsuit prompted HUD to reopen its NEPA review. Accordingly, the Court is unconvinced at this juncture that HUD is entitled to judgment as a matter of law dismissing plaintiffs' claim for attorneys fees as it relates to the original EA/FONSI.

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[23] At oral argument, plaintiffs' counsel largely conceded that the original MOA has been superceded, but continued to argue that the original EA and FONSI were final agency actions, which are justiciable separate and apart from the new EA and FONSI addressed earlier in this opinion.

[24] The ordinary remedy for unsustainable agency findings under NEPA is to remand the matter to the agency "for further consideration." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519,549 (1978); see also *Federal Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case--even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason."). Here, HUD undertook such further consideration without being ordered to do so (albeit after plaintiffs' initially-filed suit), and the Court has determined these subsequent efforts to satisfy NEPA.

III.CONCLUSION

Accordingly, for the foregoing reasons, **IT IS ORDERED** that: (1) plaintiffs' Motion for Summary Judgment and Permanent Injunction **is DENIED**; (2) Federal Defendant's (HUD's) Cross Motion for Summary Judgment is **GRANTED IN PART**, in that HUD is entitled to judgment dismissing plaintiffs' claims under the NHPA and plaintiffs' claims under NEPA insofar as they relate to the February 20, 2003 EA/FONSI, and **DENIED IN PART**, in that it is denied on the issue of mootness; and (3) HANO's Motion for Summary Judgment and the Cross Motion for Summary Judgment filed by intervenor HRI are denied as moot.

New Orleans, Louisiana, this 11th day of April, 2003.

/s/
KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30875

COLISEUM SQUARE ASSOCIATION, INC.,
SMART GROWTH FOR LOUISIANA,
LOUISIANA LANDMARKS SOCIETY, INC.,
HISTORIC MAGAZINE ROW ASSOCIATION, and
URBAN CONSERVANCY INC.,
Plaintiffs-Appellants

v.

ALPHONSO JACKSON, ETC., et al,
Defendants

ALPHONSO JACKSON, Acting Secretary
United States Department of Housing & Urban Development
and
HOUSING AUTHORITY OF NEW ORLEANS,
Defendants-Appellees

No. 04-30522

COLISEUM SQUARE ASSOCIATION, INC.,
SMART GROWTH FOR LOUISIANA,
LOUISIANA LANDMARKS SOCIETY, INC.,
HISTORIC MAGAZINE ROW ASSOCIATION, and
URBAN CONSERVANCY INC.,
Plaintiffs-Appellants

v.

ALPHONSO JACKSON, Acting Secretary
United States Department of Housing & Urban Development
and

HOUSING AUTHORITY OF NEW ORLEANS,
an agency of the State of Louisiana,
Defendants-Appellees

v.

HISTORIC RESTORATION, INC.,
Intervenor - Apellee

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

December 13, 2006

ON PETITION FOR REHEARING

Before JONES, Chief Judge, and KING and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is **DENIED**.

ENTERED FOR THE COURT

___/s/_____
United States Circuit Judge

APPENDIX E

UNITED STATES DEPARTMENT OF HOUSING and URBAN DEVELOPMENT

ENVIRONMENTAL ASSESSMENT AND COMPLIANCE FINDINGS FOR THE RELATED LAWS

An executed copy of the Department of Housing & Urban Development's finding of no significant impact form is on file with the Clerk of the United States Supreme Court.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the National Environmental Policy Act are codified at 42 U.S.C. §§ 4321 *et seq.* as follows:

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality estab-

lished by subchapter II of this chapter, which will insure that presently un-quantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which in-

volves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

APPENDIX G

REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the federal regulations governing all federal agencies are printed at 49 C.F.R. §§ 1500 *et seq.* as follows:

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub.L. 91-190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C)(environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and area wide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1508.13 Finding of no significant impact.

"Finding of No Significant Impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPELLANTS' RECORD EXCERPTS

TRANSCRIPT OF COMMENTS MADE BY JOHN WETTERMARK TO SECTION 106 MEETING HELD AT HANO, 4100 TOURO STREET, NEW ORLEANS, LA ON OCTOBER 14, 2002 (ATTACHED TO JANUARY 24, 2003 AFFIDAVIT OF JOHN WETTERMARK).

Page 74

I'm glad that the introduction of incompatible visual elements was brought up in the findings, because in the store design it needs to be noted that while, as an architect I don't think it is that important, the skin of the building when you have something of this size, but it's been sold to the public that

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yes, this will compatible with the area because it's going to be made out of the brick like the surrounding historic buildings. If you look at the elevations there, over 75 percent of the building is concrete block. There's a generic tern for it smooth face CMU, integral color. CMU is concrete masonry unit. And I hope there's not an argument made that concrete block equals brick. It does not.

And, again, visually compatible material. There is a reasoning in there that the size of the building is compatible with because there are other -- it's reasoned that there are other large buildings that were in there. It doesn't give any rational along the

same lines for the 850 space parking lot which covers more than a block. Where is the argument that there are other parking lots of that size in this neighborhood or anywhere in uptown New Orleans. Thank you.

LAMBERT ADVISORY COUNSEL LC, *ST. THOMAS HOPE VI & WAL-MART EVALUATION* 7-8 (DRAFT APRIL 11, 2002).

As Wal-Mart's insistence with maintaining a parking lot sized beyond what the City zoning code allows shows, parking is a critical element of successful retail in all but the most unique cases (the French Quarter of New Orleans being one example). There is a question of fairness to other City of New Orleans businesses in granting Wal-Mart's request to extend its parking allowance, particularly those businesses within retail corridors such a Magazine Street where it is impossible for individual retailers to provide for the parking needs of their customers. This is particularly important for higher volume tenants such as restaurants. However, rather than simply deny the Wal-Mart request for expanded parking, we suggest that a parking needs assessment be completed for key retail corridors in the City. The second phase of our study will explore how other cities have used TIF to improve parking in key retail districts.

LETTERS FROM THE NATIONAL PARK SERVICE TO THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

United States Department of the Interior

NATIONAL PARK SERVICE
Southeast Regional Office
Atlanta Federal Center
1924 Building
100 Alabama St., S.W.
Atlanta, Georgia 30303

IN REPLY REFER TO:

NOV. 18, 2002

Mr. David G. Blick
Historic Preservation Specialist
U.S. Department of Housing and Urban Development
Office of Community Planning and Development
451 Seventh Street, SW – Room 7244
Washington, DC 20410

Dear Mr. Blick:

This office has been asked to clarify the National Park Service (NPS) position on the possible impact of the St. Thomas HOPE VI project in New Orleans on National Historic Landmarks (NHL) in the project's "Area of Potential Effect." We have attempted to examine this matter, but find that our files contain insufficient information to allow us to clarify the position stated previously by this office. Recent discussions with various parties about the project history have provided conflicting information. Without additional documentation, we can not clarify the reasoning for the pre-

vious NPS decision We understand that an amended Memorandum of Agreement (MOA) will be signed tomorrow, November 19, 2002, which does not allow sufficient time to investigate this matter.

We request that the signing of the MOA be delayed to provide this office time to respond adequately on the project's impacts on National Historic Landmarks. We hope that you will not proceed with an MOA at this time on the basis of previous NPS correspondence that is assumed to serve as clearance for NHLs in the project's "Area of Potential Effects." We regret that we must request this delay at the eleventh hour, but National Historic Landmarks are considered to be the most important historic properties in the United States. They are national treasures worthy of extra caution.

Thank you for your understanding.

Sincerely,

_____/s/_____

Paul B. Hartwig
Associate Regional Director
Cultural Resource Stewardship and Partnership

cc: Laurel Wyekoff, Louisiana State Historic Preservation Officer; Judith Jones Moran, Housing Authority of New Orleans; Milan Ozdinec, HUD; Lee Keatinge, Advisory Council on Historic Preservation; Ray Nagin, Mayor of New Orleans; Elizabeth Merritt, National Trust for Historic Preservation; John Wettermark, Coliseum Square Association; Barry Schlaile, Historic Magazine Row; Rick C. Normand, Louisiana Landmarks Society, Inc.; William E. Borah, Smart Growth for Louisiana; Elhrei Thibodeaux, New Orleans Historic District Landmark Commission; Cammille Jones Strahan

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

DEC 16 2002

H32(2255)

Mr. David Blick
Historic Preservation Specialist
U.S. Department of Housing and Urban Development
Office of Community Planning and Development
451 Seventh Street, SW, Room 7244
Washington, DC 20410

Dear Mr. Blick:

This letter responds to your recent inquiry to the Director of the National Park Service (NPS) concerning the two letters from our Southeast Regional Office on the Department of Housing and Urban Development (HUD)-funded St. Thomas HOPE VI Redevelopment Project in New Orleans.

We have reviewed the two letters in question: Mr. Cecil McKithan's of September 10, 2002 (Mr. McKithan has since retired from federal employment), and Mr. Paul Hartwig's of November 18, 2002. Prior to issuing his letter, Mr. McKithan visited the site and reviewed certain documents from the project sponsor. Mr. McKithan said in his letter that the redevelopment would not have an adverse effect on any of the four National Historic Landmarks within the project's Area of Potential Effect. We are not aware of any dispute over Mr. McKithan's letter insofar as it pertains to new construc-

tion. Following Mr. McKithan's retirement, one for the parties to the Section 106 consultation process asked Mr. Hartwig to clarify whether NPS had taken into account such issues as the impact of increased traffic on the Garden District (NHL).

Mr. Hartwig reviewed the materials noted above and asked that conclusion of the 106 process be delayed to allow his office additional time to assess the project's impacts. However, given that HUD, in accordance with 36 CFR 800.10(c), appropriately sought NPS' comments and relied on those comments in good faith, we now withdraw our request that the 106 process be delayed to allow for further review by NPS.

Sincerely,

/S/

A. Durand Jones
Deputy Director

cc: Don Klima, Advisory Council on Historic Preservation

EXCERPT FROM AMENDED MEMORANDUM OF UNDERSTANDING, EXECUTED FEBRUARY 1, 2003, PAGE 2

WHEREAS, the proposed undertaking is described as follows:

- On-Site Redevelopment:
    - Demolition of 116 public housing buildings
    - Mothball of five public housing buildings and future rehabilitation for office/retail use
    - Installation of infrastructure for residential areas
    - New construction of approximately 369 housing units in 185 buildings including one-, two-, and three-bedroom rental units in double and four-plex configurations and single family attached and detached homes
    - New construction of 200 rental units (two 4- and 5-story buildings covering two city blocks) of one-, two-, and three-bedroom rental units with structured parking and ground floor retail
    - New construction of Riverview Continuing Care Retirement Center, consisting of approximately 312 units in one 13-story structure covering one city block with structured parking
    - New construction of residential condominiums that consist of one 14-story structure of approximately 100 units with structured parking
    - Disposition of approximately 6 acres from HANO to HRI for Riverview Retail Development.
    - New construction of Riverview Retail Development of approximately 199,000 square feet, with surface parking for 825 automobiles

- The Riverview Retail Development, to be occupied by a Super Wal-Mart, is bounded by Tchoupitoulas, Josephine, Rousseau, Religious, and St. Mary Streets. The retail development includes demolition of two properties that are contributing resources to the Lower Garden District: the Pelican Cotton Press at 425-41 St. Andrew Street and a water tower at 442 St. Andrew Street.

  - New Construction of approximately 67 elderly housing units in one 3-story building.

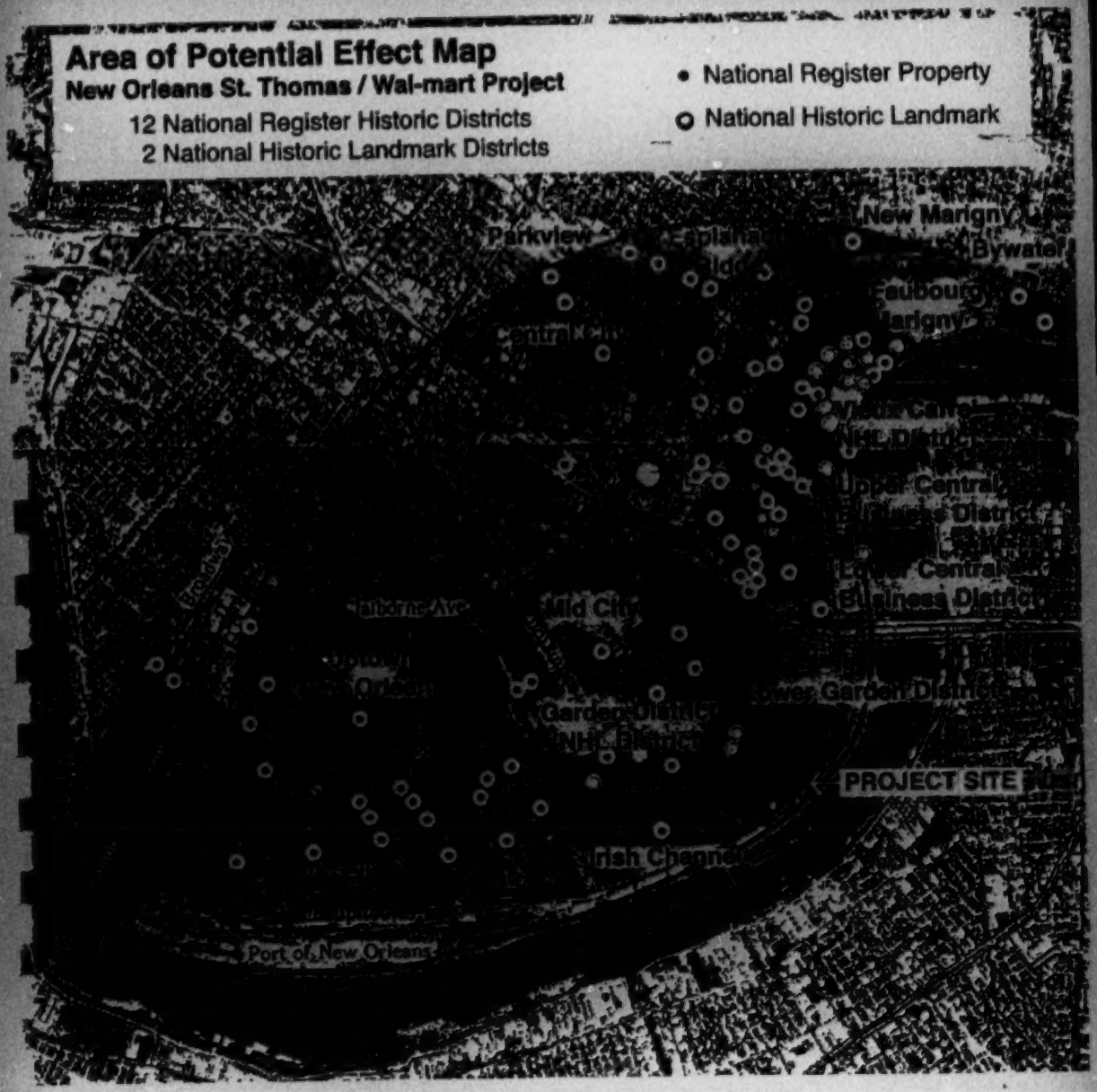
- Odd-Site Residential Program
  - Future demolition, new construction, and/or rehabilitation of 100 subsidized three- and four-bedroom units on scattered sites throughout the City of New Orleans.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPELLANTS' RECORD EXCERPTS

A map of the Project site in relation to numerous other National Register and National Historic Landmark districts and individual properties is attached hereto as Appendix H.



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